INDEX.

Subject Index.

	Page
Statement as to jurisdiction	1
Statutory provisions sustaining jurisdiction	2
Legislative act of the State, validity of which is involved	3
Summary of the pertinent provisions of the opinion (of the Commission)	3
History	5
Conclusions and findings	5
(1) Property value	5
(2) Annual accrual to depreciation	
(3) Available revenue	5
(4) Annual rate of return	5
(5) Reasonable schedule of rates	6
Summary of the pertinent provisions of the order (of the Commission)	6
Date of judgment and of presentation of petition for appeal	7
Nature of the case and of the rulings of the State courts showing jurisdiction	10
Nature of the case	10
Rulings of the State courts showing jurisdiction	13
The grounds upon which it is contended that the questions involved are substantial	29
Cases supporting jurisdiction	34
Opinions appended	35
Appendix A:	
Opinion of the Court of Civil Appeals, Third Supreme Judicial District of Texas, in No. 8176	36
Appendix B:	
Opinion of the Railroad Commission of Texas in G. U. Dockets 49 and 63	56

Constitution and Statutes.

	Page
Ch. 14, 45 Stat. 54, United States Code, Title 28, Sec. 861a	2
Ch. 440, 45 Stat. 466, United States Code, Title 28, Sec. 861b	2
Ch. 229, 43 Stat. 936-7, United States Code, Title 28, Sec. 344a	2
Constitution of the United States, 14th Amendment, Section 1	20, 21, 28
Constitution of the State of Texas, Article I, Section 19	15
Johnson Act (Subd. (1), Section 41, Title 28, U. S. C. as amended May 14, 1934)	34
Revised Statutes of Texas, 1925, Art. 6058	4
Revised Statutes of Texas, 1925, Arts. 1876, 1877	7
Revised Statutes of Texas, 1925, Art. 1728	7
Revised Statutes of Texas, 1925, Art. 1729	8
Revised Statutes of Texas, 1925, Art. 1740	8
Revised Statutes of Texas, 1925, Art. 1742	8
U. S. Code, Title 28, Section 380	11, 27

Court Rules.

Supreme Court of Texas, Rule 4	9
United States Supreme Court, Rule 12	1

Table of Cases.

Atchison, etc. Ry. Co. v *U. S.*, 284 U. S. 248, 260-263	33
Bacon v. *Texas*, 163 U. S. 207, 215	9, 35
Baltimore & Ohio R. v. *U. S.*, 298 U. S. 349, 368, 378	32
Bluefield Co. v. *Public Service Commission*, 262 U. S. 679, 683, 690	31, 34
Board of Commissioners v. *N. Y. Telephone Co.*, 271 U. S. 23, 31, 32	31
Borden's Co. v. *Baldwin*, 293 U. S. 194, 209	32
Cedar Rapids Gas Co. v. *Cedar Rapids*, 223 U. S. 655	29
Chicago, B. & Q. R. Co. v. *Osborne*, 265 U. S. 14, 16-17	32

Page

King Manufacturing Co. v. *City Council of Augusta*, 277 U. S. 100, 112, 114 35
Live Oak Ass'n v. *R. R. Commission*, 269 U. S. 354, 356 35
Los Angeles Gas & Electric Co. v. *Commission*, 289 U. S. 287, 315-316 ..... 5, 29
Northern Pacific Ry. v. *Department of Public Works*, 268 U. S. 39, 43, 45 ..... 29, 30
Ohio Valley Water Co. v. *Ben Avon Borough*, 253 U. S. 287, 289 32
San Antonio & A. P. R. Co. v. *Wagner*, 241 U. S. 476, 477 ..... 9, 35
St. Joseph Stock Yards Co. v. *U. S.*, 298 U. S. 38, 49-54 32
Smith v. *Illinois Bell Tel. Co.*, 282 U. S. 133, 161, 162 31
Sullivan v. *Texas*, 207 U. S. 416, 422 ..... 9, 35
United Railways v. *West*, 280 U. S. 234, 254 32
West v. *C. & P. Telephone Co.*, 295 U. S. 662, 671, 679 ..... 31, 32
West Ohio Gas Co. v. *Commission* (*No.* 1), 294 U. S. 63, 72 35
West Ohio Gas Co. v. *Commission* (*No.* 2), 294 U. S. 79, 81, 82 ..... 30, 33
Willcox v. *Consolidated Gas Co.*, 212 U. S. 19 29
Williams v. *Bruffy*, 96 U. S. 176, 182-184 34

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 807

UNITED GAS PUBLIC SERVICE COMPANY,
Appellant,

vs.

STATE OF TEXAS ET AL.

APPEAL TO THE SUPREME COURT OF THE UNITED STATES FROM THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF TEXAS.

STATEMENT AS TO JURISDICTION.

Pursuant to paragraph 1, Rule 12 of the Supreme Court of the United States, as amended March 2, 1936, United Gas Public Service Company, appellant in this appeal from a final judgment entered in the above cause by said Court of Civil Appeals, respectfully shows the following in support of the jurisdiction of the Supreme Court of the United States to review the aforesaid cause on appeal.

a. **Statutory Provisions Sustaining Jurisdiction.**

Chapter 14, 45 Stat. 54 of the Acts of Congress of January 31, 1928 (U. S. C., Sup. VI, Title 28, "Judicial Code and Judiciary," Sec. 861a) provides:

> "The writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtained by appeal."

Chapter 440, 45 Stat. 466, of the Acts of Congress of April 26, 1928 (U. S. C., Sup. VI, Title 28, "Judicial Code and Judiciary," Sec. 861b) provides:

> "The statutes regulating the right to a writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right and of invoking such relief, including the provisions relating to costs, supersedeas, and mandate, shall be applicable to the appeal which the preceding section substitutes for a writ of error."

Chapter 229, 43 Stat. 936-7, of the Acts of Congress amends subsection (a) of Section 237 of the original Judicial Code, so that the same provides as follows (U. S. C., Title 28, "Judicial Code and Judiciary," Sec. 344(a)):

> "(a) A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Su-

preme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ."

The statutes of Texas disclosing that the judgment of the Court of Civil Appeals was the final judgment or decree in this suit in the highest court of the State of Texas in which a decision in the suit could be had, are quoted in the subsequent part of this Statement headed "(c) Date of Judgment and of Presentation of Petition for Appeal."

b. Legislative Act of the State, Validity of Which is Involved.

The legislative act, validity of which is involved, is a final rate reduction and refund order applying to the city of Laredo, Texas, made and entered by the Railroad Commission of Texas on June 13, 1933, regulating, commencing January 1, 1932, appellant's revenues and rates for general domestic gas service in Laredo. An opinion by the Commission was entered as part of the order. Neither the order nor the opinion have been officially published. The full text of both the opinion and the order are attached to this Statement as Appendix B. Their pertinent provisions are summarized as follows:

Summary of the Pertinent Provisions of the Opinion.

History.

Appellant supplies natural gas to the inhabitants of the city of Laredo, Texas, by means of field gathering lines, transmission lines, and a municipal distribution system of gas mains, service pipes, etc., appellant having acquired these properties from two affiliated companies, Texas Border Gas Company and South Texas Gas Company, during the pendency of this proceeding before the Commission.

Since 1921, the rate for domestic use in Laredo has been 75 cents per 1000 cubic feet of gas, 10 per cent discount for prompt payment of bills, minimum monthly bill $1.00. On December 15, 1931, the city governing body of Laredo enacted an ordinance prescribing a domestic rate of 40 cents per 1000 cubic feet, 10 per cent discount for prompt payment of bills, minimum monthly bill $1.00. The matter reached and was heard by the Commission on two appeals, each taken under Article 6058, Revised Civil Statutes of Texas, 1925,[1] the first being an appeal from the ordinance prior to January 1, 1932, and the second being an appeal from the refusal of the city authorities of Laredo to act on appellant's application for an increase in the existing 75 cent rate schedule. These two appeals, being consolidated for hearing, were heard by the Commission in October and November, 1932. The properties were valued as a combined property and the evidence fully presented every phase of the controversy.

[1] Art. 6058. Appeal from City Control.—When a city government has ordered any existing rate reduced, the gas utility affected by such order may appeal to the Commission by filing with it on such terms and conditions as the Commission may direct, a petition and bond to review the decision, regulation, ordinance, or order of the city, town or municipality. Upon such appeal being taken the Commission shall set a hearing and may make such order or decision in regard to the matter involved therein as it may deem just and reasonable. The Commission shall hear such appeal *de novo*. Whenever any local distributing company or concern, whose rates have been fixed by any municipal government, desires a change of any of its rates, rentals or charges, it shall make its application to the municipal government where such utility is located and such municipal government shall determine said application within sixty days after presentation unless the determination thereof may be longer deferred by agreement. If the municipal government should reject such application or fail or refuse to act on it within said sixty days, then the utility may appeal to the Commission as herein provided. But said Commission shall determine the matters involved in any such appeal within sixty days after the filing by such utility of such appeal with said Commission or such further time as such utility shall in writing agree to, but the rates fixed by such municipal government shall remain in full force and effect until ordered changed by the Commission. (Revised Civil Statutes of Texas, 1925.)

Conclusions and Findings.

(1) *Property Value.*—The present fair value of company's properties used and useful in gathering, transporting and distributing the natural gas supplied in Laredo is $885,000. This value includes the Pescadito-Jennings transmission lines and West Jennings gathering system, which were used in the service of Laredo only one day in the twelve months ended July, 1932, and are neither being used nor are they necessary for stand-by equipment for Laredo. Because of this valuation of the properties no additional and separate allowance for going value is made. The Supreme Court of the United States recently held (*Los Angeles Gas Corp. v. Comm.*, 289 U. S. 287) that an excess in rate base was applicable to going value, and that the failure to describe that excess as going value was unimportant, if the rate base was in fact large enough to embrace that element.

(2) *Annual Accrual to Depreciation.*—Three per cent (of rate base) is considered ample to meet company's future requirements.

(3) *Available Revenue.*—An average of revenues and expenses for the four fiscal years ended respectively June, 1929, 1930 and 1931, and July, 1932, constitutes the test period for the computation of the rate structure upon which a fair return is to be predicated. The fiscal years ended in 1931 and 1932 were both subnormal. Gross revenues received in the fiscal year ended 1930 were substantially higher than in the fiscal year ended 1929. The inclusion in the computation of the fiscal year ended 1929 tends to equalize the effect of including the fiscal year ended 1930. Reasonable compensation—and not the amounts shown by the statements of actual operating expenses—should be allowed the company in connection with loss on bad debts, general office expense, advertising, maintenance of general

structures, donations, testing mains for leaks, and rate case expense (amortized over a period of ten years).[1]

(4) *Annual Rate of Return.*—Seven per cent of the present fair value of the properties is adequate.

(5) *Reasonable Schedule of Rates.*—A rate schedule of 55 cents net per 1000 cubic feet of gas for all domestic uses, 10 per cent penalty for nonpayment in ten days, minimum monthly bill $1.00, is reasonable and its application will produce a net return in excess of 7 per cent on the present fair value of the properties after providing operating expenses and the depreciation reserve accrual.

Summary of the Pertinent Provisions of the Order.

The above opinion stating the Commission's conclusions and findings having been filed in the case, the opinion is made part of the order.

It is ordered that the rates to be charged to consumers of natural gas in Laredo, from and after January 1, 1932, shall be: For natural gas for domestic use, 55 cents per 1000 cubic feet, minimum monthly bill $1.00, 10 per cent penalty for nonpayment of bills within 10 days. It is further ordered that no fixed charges be set for the sale of natural gas to Laredo nondomestic consumers. It is further ordered that the company shall refund to the city of Laredo for the benefit of domestic gas consumers the difference between the amount collected by the company and the amount that would have been due by domestic consumers under the order. The application for increase in domestic gas rates is denied.

---

[1] The amount of the "reasonable compensation" allowed and used in lieu of the actual amount of these operating expenses is not disclosed by the Commission's opinion or order or by any other part of the record before the Commission or in this trial.

The order is dated at Austin, Texas, June 13, 1933, signed by the Railroad Commission of Texas by the members of the Commission and attested by the secretary.

c. Date of Judgment and of Presentation of Petition for Appeal.

The judgment sought to be reviewed is the judgment of the Court of Civil Appeals for the Third Supreme Judicial District of Texas entered October 30, 1935, in cause numbered 8176 and styled United Gas Public Service Company, appellant, v. State of Texas et al., appellees, being an appeal from the District Court of Travis County, Texas. The Texas statutes provide (reference being to the Articles of the Revised Civil Statutes of Texas, 1925, which is a recodification adopted by the Texas Legislature, and approved by the Governor of Texas on April 1, 1925):

> "ART. 1876. Decision and Opinion.—The Courts of Civil Appeals shall decide all issues presented to them by proper assignments of error by either party, whether such issues be of fact or of law, and announce in writing their conclusions so found."
>
> "ART. 1877. Motion for rehearing.—Any party desiring a rehearing of any matter determined by any Court of Civil appeals, may, within fifteen days after the date of entry of the judgment or decision of the court, or the filing of the findings of fact and conclusions of law, file with the clerk of said court his motion in writing for a rehearing thereof, in which the ground(s) relied upon for the rehearing shall be distinctly specified, * * *."

Appellant's motion for rehearing by the Court of Civil Appeals was filed the 14th day of November, 1935, and overruled January 8, 1936.

Pertinent sections of Art. 1728, Revised Civil Statutes of Texas, 1925, are:

"Appellate jurisdiction.—The Supreme Court shall have appellate jurisdiction co-extensive with the limits of the State, extending to all questions of law arising in the following cases when same have been brought to the Courts of Civil Appeals from final judgment of trial courts:

1. * * *

2. * * *

3. Those involving the construction or validity of statutes necessary to a determination of the case.

4. * * *

5. Those in which the Railroad Commission is a party.

6. * * *

In all cases where the judgment of the Court of Civil Appeals is a correct one and where the principles of law declared in the opinion of the court are correctly determined, the Supreme Court shall refuse the application; * * *"

Pertinent provisions of the Texas statutes governing review of decisions of Courts of Civil Appeals by the Supreme Court of Texas are:

"ART. 1729. Writ of error or certificate.—All causes mentioned in the preceding article (1728) may be carried to the Supreme Court either by writ of error or by certificate from the Court of Civil Appeals, * * *."

"ART. 1740. Petition for writ of error.—A writ of error before the Supreme Court may be applied for by petition addressed to said Court and the petition shall contain such other requisites as may be prescribed by the Supreme Court; * * *."

"ART 1742. Filing.— The petition shall be filed with the clerk of the Court of Civil Appeals within thirty days from the overruling of the motion for rehearing."

Appellant's petition applying for writ of error in this cause was filed with the clerk of the Court of Civil Appeals the 7th day of February, 1936. This petition, accompanied by the record, was filed forthwith in the Supreme Court of Texas and became Application No. 21776 on the docket of that court. The application was denied by the Supreme Court October 6, 1936.

Motion for rehearing upon action of the Supreme Court of Texas in denying application for writ of error is not covered by the statutes of Texas, but is provided for in Rule No. 4 of the Rules of the Supreme Court of Texas, pertinent provisions of such Rule being as follows:

> "A motion for rehearing of an application for writ of error is not a matter of right, but in case such motion shall be filed within fifteen days after the refusal of the application and before the court shall adjourn for the term, the court will consider the same if it be based upon a ground not embraced in the application or contains the citation of authorities not before cited. * * *."

Appellant's motion for rehearing upon the action of the Supreme Court of Texas in refusing its application for writ of error was filed the 22nd day of October, 1936, and overruled the 30th day of December, 1936.

Under Sec. 344(a), Title 28, United States Code, the judgment of the Court of Civil Appeals entered October 30, 1935, became, at the time the Supreme Court of Texas overruled appellant's motion for rehearing, a final judgment or decree in this suit in the highest court of the State of Texas in which a decision in this cause could be had.[1]

Appellant's application for appeal from this judgment to the Supreme Court of the United States was presented to the Chief Justice of the Court of Civil Appeals for the

---

[1] *Bacon* v. *Texas*, 163 U. S. 207, 215; *Sullivan* v. *Texas*, 207 U. S. 416, 422; *San Antonio and A. P. R. Co.* v. *Wagner*, 241 U. S. 476, 477.

Third Supreme Judicial District of Texas on January 5, 1937, and by him refused on January 7, 1937; and was presented to Hon. Benjamin N. Cardozo, Associate Justice of the Supreme Court of the United States on January 15th, 1937.

The Nature of the Case and the Rulings of the Court Showing Jurisdiction.

The Nature of the Case.

The events leading up and giving rise to appellant's appeals to the Railroad Commission of Texas, as well as the Commission's conclusions, findings of fact and rate order pursuant to such appeals, have been summarized on pages 3-7 hereof.

On June 29, 1933, appellant filed a bill in equity in the United States District Court seeking to enjoin the Commission and the city of Laredo from enforcing the Commission's said order upon the ground that such order was confiscatory. Appellees, on July 26, 1933, filed this suit against appellant in the State district court. Appellees averred that appellant had brought the prior suit in the Federal court, and had alleged therein

> "• • • that the order entered by the Railroad Commission of Texas fixed and prescribed a rate confiscatory of its property used and useful in the public service • • •"

and, upon said allegation, that appellant had secured a temporary restraining order, and further averred that appellant's application for interlocutory injunction was set for hearing in the Federal court on July 31, 1933 (par. X). Paragraph XI of appellees' said petition reads:

> Plaintiffs are desirous of having the constitutional questions involved in the attack being made by United Gas Public Service Company upon the Commission's

> order heard and determined in the courts of this State, and to that end desire this court to enter a stay of proceedings in accordance with the provisions of Section 380, Title 28, U. S. C. A. to the end that all proceedings in the district court of the United States will be stayed pending a final determination of this cause in the courts of this State.

Appellees prayed that, pending a final determination of the suit in the courts of the State, appellees be stayed from enforcing the order, and that upon final hearing appellant be permanently enjoined from making charges in excess of the rates prescribed by the Commission in said order. The Commission's order and its opinion made a part thereof were attached to said petition and incorporated therein by reference.

Appellees, on July 26, 1933, the same day the second suit was filed, sought and obtained from the State court a court order directing that all proceedings to enforce said rate order against appellant be stayed, said court order also directing that appellees refrain from taking any steps to enforce said rate order pending the determination of said cause in the State court, and directing further that appellant

> "* * * shall not be subjected to any penalties, damages or forfeitures on account of its failure to comply with * * * said order of the Railroad Commission * * *, or on account of any provisions of the statutes of this State, where such failure to comply with same has taken or takes place before the final determination of this suit." (Order staying proceedings, filed July 26, 1933.)

Upon appellees' motion, further proceedings in the Federal court were stayed. (Order of Federal court staying proceedings.)

By amended answer filed in this suit on March 5, 1934,[1] appellant attacked the validity of the order because it was without findings essential to support it (section A, 2 (a) and (c); par. III (a)); because the findings made by the Commission in respect of the use of average revenues for four prior years did not support the order, in that the necessary effect of the Commission's method—namely, averaging with the revenues for the year ended July, 1932, the much higher revenues of the three prior years, fixing a rate upon such average; and then making such rate retroactive to January 1, 1932—was to fix a confiscatory rate from January 1, 1932, and in that the practical result was to enforce present confiscation by use of prior predepression earnings, calculated upon a rate base fixed at depression prices (par. III). Appellant further averred that the revenues of these four prior years contained very substantial collections (about $231,000) which were non-recurring within the period regulated by the order and for the future, and hence the use of such average revenue figure was arbitrary and imposed confiscation (par. VIII).

In section D of said answer, appellant specifically averred that the reproduction cost new of its properties used and useful to serve Laredo in both 1932 and 1933 exceeded $1,439,525.00; that reproduction cost new, less depreciation, exceeded $1,252,828.00; that historical cost exceeded $1,200,000.00, and that present fair value exceeded $1,225,000.00. Appellant alleged that the depreciation allowance of 3 per cent of rate base fixed by the Commission was arbitrarily determined and wholly inadequate (par. IX). Appellant alleged that, both upon fair value of $1,225,000.00 and upon the Commission rate base of $885,000.00, after providing even the inadequate depreciation allowance of 3 per cent,

[1] The proper State procedure for setting up facts which have occurred since the suit and the original answer therein were filed is by an amended answer, which takes the place of the original answer.

the existing 75 cent rate was confiscatory in 1932 and in 1933, and that the 55 cent rate would leave nothing for return in either year on a rate base of $1,225,000.00, after providing only 3 per cent thereof for depreciation. Upon the rate base and depreciation allowance fixed by the Commission, appellant alleged that application of the 55 cent rate would leave about 1 per cent return in 1932, and nothing for return in 1933. Appellant then alleged:

> "By reason of the above facts, the Commission's said order of June 13, 1933, is unlawful and void, and, if enforced, will deprive defendant of its property without due process of law, and deny it the equal protection of the laws, contrary to the Fourteenth Amendment to the Federal Constitution * * *"

The case was tried to a jury demanded by appellees, appellant's motion to discharge the jury and to try the case before the court being overruled. The entire record before the Commission was introduced (appellant's exhibit 13), but the trial was essentially *de novo*, new and full testimony being introduced as to property value, depreciation reserve accrual, revenues, expenses, rates of return, etc. in respect of 1932 and 1933, the evidence being brought as nearly as possible to the time of trial.

The result of the case, as well as the stages at which and the methods by which the Federal questions were raised, appear from the following sub-section of this statement.

Rulings of the State Courts Showing Jurisdiction

At the conclusion of all testimony, appellant, by motions for verdict and for judgment, raised the question that all the testimony as to the actual result of enforcing the order from its effective date showed the order to be confiscatory. These motions were overruled, and appellant then sought to have the questions of fact, made by the conflicting testi-

mony as to property value, depreciation reserve accrual, etc., in 1932 and in 1933, submitted to the jury as separate issues. This was done by motion for submission upon special issues and by presenting such issues to the judge with the request that they be submitted. The motion was overruled and such issues refused, and the court submitted the case to the jury upon a charge consisting of definition of terms and one question which is as follows:

> "Special Issue No. 1: Do you find that the order of the Railroad Commission of Texas bearing date June 13, 1933, providing for a fifty-five cent gas rate to residential consumers within the city of Laredo, Texas, under the facts introduced in evidence before you, is unreasonable and unjust as to defendant, United Gas Public Service Company? Answer this question 'Yes' or 'No'."

It then appearing for the first time that appellant was to be denied findings of fact in the lower court, appellant, by timely objections to the court's charge, raised the question that submission of the case in this manner denied appellant a trial of the issues of confiscation upon independent judicial findings of the facts and upon the independent judgment of the court applied to such facts as found; and likewise denied appellant a trial record from which appellant could know, reserve and present for appellate review questions in respect of such issues of confiscation, contrary to the due process and equal protection clauses of the Fourteenth Amendment to the Federal Constitution (objections to the charge, pars. I, II, III, XI). Appellant likewise objected to the charge because it was multifarious and submitted a question of law to the jury (par. XIII (f) & (g)). These objections were overruled, and the court received and entered the jury's verdict answering the above question "No". After reciting such charge and verdict in its judgment, the court then denied enforcement of the order for

any period prior to the date said judgment was entered (April 24, 1934), but permanently enjoined appellant to future compliance with said order, until the same was modified or set aside by the State regulatory authorities.[1]

By motion for new trial, which motion was overruled, appellant appropriately reserved all of the above Federal questions which arose at the trial (pars. 2, 3, 9, 26, 28, 50, 59, 73, 78, 94-116 and 234 of said motion).

The appellant, upon appeal to the Court of Civil Appeals, assigned as error by assignments 1-10 (likewise presented as propositions 1-10), the Federal questions raised below in respect of lack of evidence to support the order, in that all the evidence showed the higher 75 cent rate to be grossly inadequate at and subsequent to January 1, 1932, in that the basic assumption involved in the Commission's method of fixing the 55 cent rate upon average revenues for the four prior years, namely, that revenues at and after January 1, 1932, would equal such average, was shown by all the evidence at the trial to be directly contrary to the facts, and because all the evidence, including that most favorable to the order, showed that its enforcement from and after January 1, 1932, would deny appellant the equal protection of the laws and deprive appellant of its property without due process of law and without due course of the law of the land.[2]

The Court of Civil Appeals refused to consider, as presenting only questions of practice, assignments 11-79. These

---

[1] Prior to the time the judgment was entered appellant again raised the question that all the evidence in respect of the actual enforcement of the order from its effective date showed unquestioned confiscation, the method being by motion for judgment notwithstanding the verdict, which motion was overruled.

[2] The State Constitution contains no clause using the term "due process of law", the equivalent clause prohibiting deprivation of property—"except by due course of the law of the land." Sec. 19, Art. I, Constitution of Texas.

included assignments upon refusal of the trial court to so submit the case as to provide findings upon property value, depreciation reserve accrual (assignments 29, 31, 37, 39, 41), etc., the assignment upon the consequent denial of a trial in accordance with due process upon appellant's defences of confiscation under the Federal Constitution (assignment 18), as well as the denial of the opportunity of knowing the grounds for the jury's verdict and for any judgment based thereon, and of reserving for review in the courts of appeal, State and Federal, questions as to the existence and sufficiency of evidence to support the verdict and judgment (assignment 19). They included assignments claiming that charge submitted to the jury constituted an attempted delegation to a petit jury of the power to determine as a matter of law whether such order was repugnant to the Federal Constitution (assignment 20; also assignments 13 and 14). These points were presented by assignments 11 *et seq.*, adopted as propositions similarly numbered.

The Court of Civil Appeals, in its opinion, recognized that confiscation was raised below, saying:

> "In the State court appellant filed an answer, attacking the 55 cent rate, alleging that the rate order was based on assumption contrary to the facts with regard to the average annual revenues of appellant, and was therefore not supported by any evidence; and that because the 55 cent rate did not yield a net return of 7% per annum from January 1, 1932, down to the date of the trial (in April, 1934), and would not yield a reasonable return on the fair value of the property used in the public service, the rate order was therefore unjust and unreasonable and confiscatory, and in violation of the just compensation, the equal protection, and the due process clauses of both the State and Federal Constitutions."

The Court of Civil Appeals attempted to restate the questions presented by assignments 1-10, as follows:

"And by propositions 1 to 10, appellant in one way or another, contends that the evidence showed, as a matter of law, that the 55 cent rate order was confiscatory, and per se unjust and unreasonable, on two grounds, as follows:

1. That because the existing 75 cent rate did not yield a 7% return on the $885,000 valuation of the property from January 1, 1932, the effective date of the city ordinance, to December 31, 1933, or down to the date of the trial in April, 1934, the lower 55 cent rate would necessarily not yield a reasonable return on appellant's property.

2. That in making its calculations for the 55 cent rate the Commission assumed that appellant's revenues from January 1, 1932, would equal its revenues for the period beginning June 30, 1928, and ending July 31, 1932, which assumption was contrary to the facts, because it was assumed that the revenues from the two industrial sources which had stopped coming in were still being collected, and because of existing depression conditions, revenues had decreased, and for which reason the 55 cent rate would not afford a reasonable return on the fair value of appellant's property.

The Court's ruling on all questions raised is shown by the following excerpt from its opinion:

"Appellant briefs the appeal in two parts. In 'Part I' and by propositions 1 to 10, appellant seeks to have the judgment below reversed and judgment rendered for it. In 'Part II' of the brief and by propositions 11 to 79, appellant contends that the judgment should be reversed and the cause remanded, because of several alleged errors of practice.

We have reached the conclusion that appellant not only failed to establish its claim for reversal and rendition of judgment in its favor, but that when viewed in the light of the presumption in favor of the validity of the Commission's rate order, and of the quantum and character of proof required to overcome such presump-

> tion, the evidence adduced was insufficient, as a matter of law, to show that the 55 cent rate order was either unjust and unreasonable or confiscatory. In view of this conclusion, all questions of practice presented in 'Part II' of the brief go out of the case."

The judgment entered by the Court of Civil Appeals reformed the judgment of the lower court so as to enforce the Commission's order in its entirety and from January 1, 1932, the order's retroactively effective date, and as so reformed, affirmed the judgment below, the concluding paragraph of the opinion of the Court of Civil Appeals being:

> "In accordance with our above conclusions, the judgment of the trial court is reformed so as to also declare the retrospective effective date and refund provision of the rate order of the Commission valid and enforceable, and as thus reformed the judgment of the trial court will be affirmed."

The action of the Court of Civil Appeals in reforming the judgment gave added significance to the direct evidence and assignments as to the confiscatory effect of the order as shown by operating results for the calendar years 1932 and 1933. The manner of review employed by the court presented several additional Federal questions, and further fortified the showing upon denial of a determination of confiscation in the exercise of independent judicial judgment.

The Federal questions, as presented by the assignment of errors in this appeal, were all reserved, if they arose below, or were raised, if they first appeared from the judgment of the Court of Civil Appeals, by appellant's motion for rehearing in the Court of Civil Appeals, and have since been appropriately reserved in appellant's petition for writ of error by the Supreme Court of Texas, as well as by appellant's motion for rehearing in that Court.

The following subdivisions have the same numbers as the paragraphs in the assignment of errors to which they refer.

1. *The order is void because its enforcement will result in confiscation.*

The basis for the claim that, considering only the testimony as to revenues and expenses most favorable to the appellees, and when calculated upon the Commission's rate base and depreciation allowance, the order is confiscatory both for 1932 and 1933, is the following computation from the record:

Result of Enforcing the 55 Cent Rate.

1932.

Operating revenues	$161,637.65
Operating expenses	$125,001.40
Net for return and depreciation reserve	$ 36,636.25
Deduct 3 per cent of $885,000 for depreciation reserve	$ 26,550.00
Net Return	$ 10,086.25

Rate of return: 1-1/10 per cent of $885,000.

1933.

Operating revenues	$138,256.85
Operating expenses	$ 93,298.46
Net for return and depreciation reserve	$ 44,958.39
Deduct 3 per cent of $885,000 for depreciation reserve	$ 26,550.00
Net Return	$ 18,408.39

Rate of return: 2-1/10 per cent of $885,000.

Appellant has asserted that the judgment and order are void, because enforcement of the order will deprive appellant of its property without due process of law and deny it

the equal protection of the laws "* * * in violation of appellant's constitutional rights under Section 1, Fourteenth Amendment, U. S. Constitution" (pars. 3, 6, 7, 9, and 11, motion C. C. A. See assignments 4, 5, 6 and 7, petition, and par. 1, motion, Sup. Ct. of Tex.).

2. *Presumption of validity held irrebutable by uncontroverted evidence of the actual confiscatory effect of the order.*

The Court of Civil Appeals held that

> "* * * when viewed in the light of the presumption in favor of the validity of the Commission's rate order, and of the quantum and character of proof required to overcome such presumption, the evidence adduced was unsufficient, as a matter of law, to show that the 55 cent rate order was * * * confiscatory."

Appellant has asserted that the result of this holding, wherein the presumed character of the facts to which the order applied was given effect rather than those facts themselves, was a judgment not supported by competent evidence, and which

> "* * * operates to take appellant's property without due process * * * of law, contrary to sec. 1, Fourteenth Amendment, U. S. Constitution * * *" (par. 42, motion, C. C. A. See assignment 45, petition, and par. 3, motion, Sup. Ct. of Tex.)

3. *Denial of a lawful determination of the claim of confiscation arising from undervaluation of appellant's property.*

The Court of Civil Appeals did not consider appellant's assignments raising this question (assignments 13, 14, 18, 19, 20, 29, 31), treating them as presenting mere questions of practice. The Court of Civil Appeals did not consider, weigh or pass upon the conflicting evidence of property

value. Instead, it proceeded on the theory that it was authorized to "* * * pare down valuations unsparingly * * *", and its method of paring down was to select the lowest figure from the testimony upon value presented by any witness at the trial. The question has been appropriately reserved (pars. 32, 44, 68, 69, 73-75, 85 & 87, motion, C. C. A.: assignments 23, 28, 31, 32, 37, and 66, petition, and par. 7, motion, Sup. Ct. of Tex.).

4. *Denial of a lawful determination of the claim of confiscation arising from the inadequate allowance for depreciation reserve.*

Similarly, the Court of Civil Appeals refused to pass upon the assignments presenting this question, and failed to pass upon the competent evidence pertinent thereto, and the question has been appropriately reserved (pars. 35, 68, 69, 73-75, motion, C. C. A.: assignments 23, 28, 31, 32 and 67, petition, and par. 8, motion, Sup. Ct. of Tex.).

5. *Unlawful determination of confiscation by consideration only of evidence deemed to support the order.*

This question was first presented by the opinion of the Court of Civil Appeals. Appellant's set up by motion for rehearing that the court had given to testimony introduced by appellees

> "* * * the quality and legal effect of undisputed and indisputable evidence, and therefore appellant has been denied a trial in accordance with due process, * * * contrary to Sec. 1, 14th Amendment, U. S. Constitution * * *",

and that the court has entered judgment

> "* * * by reciting in its opinion certain testimony or purported testimony offered at the trial by appellees,

wholly ignoring all other testimony * * *, and without first requiring the trial court to decide the ultimate issues of fact made by such conflicting evidence, in violation of appellant's right to a trial of the issues of confiscation upon the independent judgment of a court, competent to determine the ultimate issues of fact from conflicting evidence, and to apply the law thereto, * * *" (pars. 28 and 29, motion, C. C. A. See assignments 36, 39 and 40, petition, and par. 10, motion, Sup. Ct. of Tex.).

6. *Unsupported finding of net return of more than 7 per cent of $700,000 for 1933 after enforcement of the order.*

The opinion of the Court of Civil Appeals states the following conclusion:

> "* * * and calculations based on the $700,000 valuation and the estimated difference in revenues between the 55 cent rate and the 75 cent rate, show a return of more than 7% for the year 1933."

Appellant asserted that the judgment in respect of confiscation entered upon such conclusion, which conclusion was without any evidence to support it, was repugnant to Sec. 1; 14th Amendment, U. S. Constitution (par. 25, motion, C. C. A. See assignment 8, presented in conjunction with assignments 4, 5, 6 and 7, petition, and par. 2, motion, Sup. Ct. of Tex.).

The record affirmatively negatives any such conclusion. The 1933 revenues under the 55 cent rate were shown by the evidence to be $138,256.85; the lowest operating expense figure for that year shown by the testimony was $93,298.46. The witness who testified to a reproduction cost new, less depreciation of $700,000, also testified to a depreciation reserve accrual of $25,000.00 per year to go with that figure

and offset the depreciation he had deducted. Hence the record shows:

1933.

Operating revenues	$138,256.85
Operating expenses	$ 93,298.46
Available for return and depreciation reserve	$44,958.39
Set aside $25,000 for depreciation reserve	$25,000.00
Available for return	$19,958.39

Rate of Return: 2-8/10 per cent of $700,000

Or, if only 3 per cent of $700,000 be taken for depreciation reserve, we have—

Net operating revenue	$44,958.39
Deduct 3 per cent of $700,000	$21,000.00
Available for return	$23,958.39

Rate of Return: 3-4/10 per cent of $700,000.

7. *Determination of confiscation upon the assumption resulting from average revenue figures for prior years, which assumption was disproved by concrete evidence of actual experience.*

During the trial, and after appellant had proved the non-recurring character of the very large amount of revenues for power plant and refinery sales which were in the average revenue calculations used by the Commission in making the order, appellees then introduced the testimony set forth in the following figures. This testimony shows operating re-

sults at the 75 cent rate, with the above nonrecurring revenues and gas expense eliminated:

	At the 75 cent Rate.				
For the year ended—	June 1929.	June 1930.	June 1931.	July 1932.	Dec. 1933.
Operating revenue.....	$222,516.93	237,989.24	206,577.17	179,059.79	158,768.22
Operating expense.....	118,368.34	137,731.40	112,370.46	109,973.16	93,298.46
Net revenue (before depreciation and income tax).....	$104,148.59	$100,257.84	$94,206.71	$69,086.63	$65,469.76

The record closed with this testimony. The Court of Civil Appeals used the above figures in the average revenue calculations set forth in its opinion, but only after elimination of about $80,000.00 from the operating expenses of the first four years. Such expenses had been included in all the testimony offered at the trial to show net revenues, and there was no competent evidence to support such action.

By motion for rehearing in the Court of Civil Appeals, appellant asserted that the use of such average revenue figures, the actual operation and confiscatory effect of the order being shown by undisputed evidence, was to employ calculations based upon purported prior profits to enforce confiscation from the effective date of the order,

> "* * * in violation of appellant's right to a trial in accordance with due process * * * and its right to just compensation, guaranteed by Sec. 1, 14th Amendment, U. S. Constitution" (pars. 2, 5, 43 and 161, C. C. A. See assignments 12-16 petition, and par. 4, motion, Sup. Ct. of Tex.).

8. *Unauthorized elimination of operating expenses from average revenue calculations:*

This action, first taken in the Court of Civil Appeals, and being without competent evidence to support it, was appro-

priately raised on Federal grounds by motion for rehearing (pars. 160, 161, and 162 C. C. A. See assignments 12, 58 and 59, petition, and par. 5, motion, Sup. Ct. of Tex.).

9. *Arbitrary selection of $700,000 as the rate base for determining confiscation.*

Appellant urged in its motion for rehearing that the Court of Civil Appeals had arrived at its conclusion with respect to confiscation

> "* * * by substituting for the * * * $885,000 fixed as rate base by the Commission a lower figure of $700,000 selected from conflicting evidence at the trial on which no proper finding has been made, and such holding and the court's judgment pursuant thereto violate appellant's rights under Sec. 1, 14th Amendment, U. S. Constitution * * *"; and are "* * * in violation of appellant's right to a trial in accordance with due process * * *." (Pars. 27 and 30, motion, C. C. A. See assignments 9, 12, 41 and 42, petition, and par. 6, motion, Sup. Ct. of Tex.)

10. *Denial of all claims of confiscation because new rate not tested.*

The Court of Civil Appeals held:

> "* * * It is also the rule that only actual experience under the rate complained of can furnish any real criterion or guide as to the effect of the rate on the business; and that this experience should be obtained by a practical test for such a period of time as will under the facts of the particular business determine the matters which are of doubtful or uncertain influence. In absence of an actual test of the rate, the court on appeal must resolve all doubts against the complaining party; pare down valuations unsparingly; and the rate must appear to be clearly confiscatory, or unjust and unreasonable before the court should by injunction restrain its enforcement in advance of actual

experience of the practical results of the rate. And while the equal protection, the due course, and the due process clauses of the fundamental laws of both state and nation guard against the taking of, or compelling of the use of private property for public service without just compensation, still they do not assure the public utility the right under all conditions and circumstances to have a return upon the value of the property so used. If actual experiences for a proper period of time under the rate complained of should reveal sufficient reasons, the rate order may then be changed through proper channels. * * *

"In the instant case appellant has continuously charged and collected the 75¢ rate; hence no actual test has been made under the lower 55¢ rate. An actual test of the lower rate might have resulted in a larger return, by bringing about an increase in appellant's business, and manifestly this court would not be warranted in holding that the lower rate was either confiscatory, or unjust and unreasonable, as a matter of law, in advance of an actual test of the rate; but that under the aforementioned rules as applied to the facts, appellant failed, as a matter of law, to show the rate either confiscatory or unjust or unreasonable. * * * And since an actual test of the new rate may bring in a larger return, by bringing about an increase in business, we do not feel warranted in setting the rate aside in absence of an actual test under the new rate. * * *

The record showed that, upon testimony of operating revenues and expenses most favorable to the validity of the order, and upon the rate base and depreciation allowance fixed by the Commission, the higher 75 cent rate had yielded 3-6/10 per cent net return in 1932, and 4-4/10 per cent net return in 1933. The record also showed that the 55 cent rate was not promulgated until June 13, 1933, and that it was voluntarily suspended by appellees so that they could try the validity of the order in the State courts. Where an enforcement suit is brought in the State court in accord-

ance with the procedure provided in Sec. 380, Title 28, U. S. C., and the suit is with respect to a proposed new rate, it is inherent in the character of the suit brought that the new rate cannot be tested before its validity is determined. To test the rate by putting it into effect pending the trial of this case would have given appellees the full relief they were seeking, and would make moot this, and any other similar enforcement suit.

The holding was questioned by appellant's motion for new trial as being inadmissible on the facts of this case, and as denying appellant an effective remedy to prevent confiscation (pars. 1, 4, 14, 57, 58 and 150, motion, C. C. A. See assignments 1, 2, 4 and 49, petition, and pars. 9 and 14, motion, Sup. Ct. of Tex.).

11. *Enforcing retroactive refund provisions without essential findings.*

This occurred when the Court of Civil Appeals reformed the judgment below, and the question was appropriately raised upon federal grounds by motion for rehearing (pars. 40, 151, 153 and 158, motion, C. C. A. See assignments 25 and 26, presented in conjunction with assignments 4 and 5, petition, and par. 11, motion, Sup. Ct. of Tex.).

12. *Denial of a trial in accordance with due process upon the issues of confiscation.*

Denial of lawful judicial review was a progressive and cumulative development in the courts of the State. The Court of Civil Appeals having refused to consider appellant's assignments upon the denial of such a trial below (assignments 13, 14, 18, 19, 20, 29, 31, 37, 39 and 41), the same assignments were reurged in appellant's motion for rehearing; and by other separate paragraphs of said motion, appellant urged that the trial below and the character

of appellate review which had been accorded it was a denial of due process, in contravention of Sec. 1 of the Fourteenth Amendment (pars. 18, 28, 31, 49-51, motion, C. C. A. See assignments 36, 37, 39, 40 and 51, petition, and pars. 10 and 14, motion, Sup. Ct. of Tex.)

13. *The Commission's order is void, because clearly confiscatory in its actual operation.*

The Commission prophesied in its order that the application of the 55 cent rate schedule

> "* * * will produce a net return in excess of seven per cent (7%) per annum on the present fair value of the properties, after provision for operations and reserve for depreciation."

Appellant asserted at each stage of this case after the testimony closed that, taking the fact findings of the Commission as to rate base and depreciation allowance, and taking only the testimony of revenues and expenses in 1932 and 1933 most favorable to appellees, and applying the order, the result is confiscation. Since the order was not enforced for 1932 and 1933 by the judgment of the lower court, this showing was asserted as showing the order confiscatory for the future (pars. 2, 9, and 234, motion for new trial, assignments 3, 6 and 9, Court of Civil Appeals).

The reformed judgment of the Court of Civil Appeals, which enforced the order from January 1, 1932, was attacked by motion for rehearing on the ground that, when tested upon the bases last above mentioned, the net return would be 1-1/10 per cent for 1932 and 2-1/10 per cent for 1933, hence the order was confiscatory and void, operated to deny appellant just compensation and took said property and the use thereof without due process, contrary to Section 1 of the Fourteenth Amendment (pars. 3, 6, 9, 45, 146 and 157, motion, C. C. A. See assignments 4, 5, 7, 26, 46-48, petition, and pars. 1 and 14, motion, Sup. Ct. of Tex.)

The question presented, as the cumulative effect of the errors separately assigned, is that the State, through its Railroad Commission, is attempting to secure a result forbidden by the Federal Constitution, requiring the order to be held void and the judgment enforcing it reversed.

The Grounds Upon Which It Is Contended That the Questions Involved Are Substantial.

This is not a case in which the claim of confiscation depends solely upon "* * * whether the evidence requires the conclusion that by reason of the inadequacy of the valuation the result is confiscation." *Los Angeles Gas & Electric Co.* v. *Commission,* 289 U. S. 287, 315-316. Nor does the claim depend upon a like conclusion with respect to the inadequacy of the depreciation reserve accrual. Resort need not be had to speculation and prophecy, nor is there call to resolve the uncertainties of conflicting testimony. The order was retroactive in effect and at the trial full evidence as to two years actual operations subject to the order were in evidence. Accept the rate base, and the allowance for depreciation reserve, fixed in the assailed order, take from the evidence with respect to completed operations only that most favorable to the order and the undisputed result is a net return of 3-6/10 per cent for 1932 and of 4-4/10 per cent for 1933 at the 75 cent rate. The same calculation shows that if the 55 cent rate is applied a net return of 1-1/10 per cent for 1932 and of 2-1/10 per cent for 1933 results. This is denial of just compensation by so wide a margin upon the Commission's own rate base and depreciation allowance, as to make inapplicable the so-called "test" cases. Cf. *Willcox* v. *Consolidated Gas Company,* 212 U. S. 19; *Cedar Rapids Gas Company* v. *Cedar Rapids,* 223 U. S. 655, and similar cases. Instead, the case comes quite clearly within the principle of *Northern Pacific Railway* v. *Department of Public Works,* 268

U. S. 39, 45, where it was held that if existing rates are confiscatory there can be no basis for requiring a test of lower rates in the future. To hold otherwise would be to prefer prophecy to experience which was expressly condemned in *West Ohio Gas Company* v. *Commission* (No. 2), 294 U. S. 79, 82.

This case is likewise peculiar in that there was no opportunity to test the rate here in question. The 40 cent rate fixed by the city council was suspended by the appeal to the Railroad Commission and was found by the Commission to be unreasonable and the 55 cent rate substituted. Thus from January 1, 1932 (the effective date of the order), until June 13, 1933 (the date of entry of the order), the 55 cent rate was not in existence to be put to a test. After the Commission's order was entered, appellees filed this suit to enforce the order and themselves caused the order to be suspended by the State court. Thus at all times except the short period between the date of the Commission's order and the date of the filing of this suit there has either been no 55 cent rate, or the rate has been suspended by appellees' own action.

It is to be noted that the above showing of confiscation does not require the use of the much higher valuation asserted by appellant, and supported by substantial evidence, which, if accepted, would result in an even greater degree of confiscation. No finding as to the value of the property was made in the trial court and the Court of Civil Appeals made no such finding. Instead, it arbitrarily selected for its calculations the lowest figure offered by any witness at the trial and such figure related solely to reproduction cost new, less depreciation. The court ignored both the Commission's finding of fair value and all other evidence tendered by either party, and expressly negatived any finding of fair value by stating that it was authorized to "pare down values unsparingly". The court characterized the

Commission's valuation as "generous" because it included a pipe line and gathering system used only one time during the fiscal year ended July, 1932. The uncontroverted evidence both before the Commission, and at the trial, established that this property was in constant use prior to such 12 months period, when it was shut down for repairs, and that it was again put back in service and used throughout the winter heating season 1932-1933. The court ignored this evidence.

Since the Commission's rate would clearly fail to yield appellant a reasonable return upon the fair value of its property, used and useful in rendering the service, the enforcement of the order would deprive appellant of its property without due process of law in violation of the Fourteenth Amendment. *West* v. *Chesapeake & Potomac Telephone Company*, 295 U. S. 662, 671, *Bluefield Company* v. *Public Service Commission*, 262 U. S. 679, 690, *Board of Commissioners* v. *N. Y. Telephone Co.*, 271 U. S. 23, 31.

So far as the judgment below requires refunds to be made for periods prior thereto it is plainly invalid for want of adequate findings to support it. No finding was made by the trial court and none by the appellate court with respect to value, rates of return, depreciation reserve accrual and net revenues available for return before and after refund for either of the years involved. Such findings with respect to each year involved were essential to support the requirement of refunds and to compel appellant to make such refunds in the absence of such findings would deprive it of its property without due process of law in contravention of the Fourteenth Amendment. *Smith* v. *Illinois Bell Telephone Company*, 282 U. S. 133, 161, 162.

In other respects the judgment below denied appellant due process. Appellant contended for, and offered evidence in support of, a fair value in excess of $1,225,000 and asserted that the $885,00 valuation found by the Commission was arbitrarily and unreasonably low. It likewise con-

tended, and offered evidence to show, that the annual rate of reserve accrual fixed by the Commission was so inadequate as to amount to confiscation. *United Railroads* v. *West*, 280 U. S. 234, 254. Appellant's evidence on these points was ignored by the Court and resort was had to the "rough and ready" device of selecting and considering only the lowest figure in the record for reproduction cost new, less depreciation, which action was similar to that condemned in *West* v. *Chesapeake & Potomac Telephone Company, supra*, p. 679. The court also failed to give any consideration to other evidence introduced by appellees themselves indicating a much higher value than that arbitrarily selected by the court. All this was done upon the apparent theory that the order was to be enforced if there was any evidence in the record to support it and is a plain denial of due process. *St. Joseph Stockyards Company* v. *United States*, 298 U. S. 38, 49-54, *Baltimore & Ohio R.* v. *United States*, 298 U. S. 349, 368, *Ohio Valley Water Company* v. *Ben Avon Borough*, 253 U. S. 287, 289, *Chicago B. & Q. R. Company* v. *Osborne*, 265 U. S. 14, 16-17. Further, the court below ignored and refused to give legal effect to the evidence showing the actual result of enforcing the order from its effective date to shortly before the date of trial, which evidence demonstrated without dispute that the enforcement of the order would clearly deny appellant just compensation. *West Ohio Gas Company* v. *Commission* (No. 2), *supra*, p. 81. Thus the practical effect of the court's action was to make irrebuttable the presumption in favor of the validity of the order, contrary to the rulings of this court. *Borden's Company* v. *Baldwin*, 293 U. S. 194, 209, *Baltimore & Ohio R. Company* v. *United States, supra*, at p. 378.

In making calculations to uphold the order the court below used average revenues with respect to prior years, reflecting conditions greatly different from those to which the order applied and which give results in direct conflict with the evidence showing the actual operation and effect of the order. The practical result was to use past profits to offset

present losses. This was not due process. *Board of Commissioners* v. *N. Y. Telephone Co., supra,* pp. 31-32, *West Ohio Gas Company* v. *Commission* (No. 2), *supra,* p. 81, *Atchison, etc. Railway Company* v. *United States,* 284 U. S. 248, 260-263. Furthermore, in making these average revenue calculations, the court arbitrarily eliminated some $80,000 of operating expenses, proved by appellant to have been actually incurred in good faith, without any evidence to support such elimination, in violation of appellant's constitutional rights. *West Ohio Gas Company* v. *Commission* (No. 1), 294 U. S. 63, 72.

Finally, the court based its judgment upholding the order in part upon material findings not supported by evidence, which likewise was a denial of due process. *Northern Pacific Railway* v. *Department of Public Works, supra,* p. 43. The court made the following specific findings:

> "So when the property valuation is pared down to this lowest valuation (about $700,000.), and doubtful items of expenses are deducted, the net revenues received by appellant under the 75 cent rate for the year ending December 31, 1933, would afford more than a 11 per cent return. And calculations based on the $700,000. valuation and the estimated difference in revenues between the 55 cent rate and the 75 cent rate, show a return of more than 7 per cent for the year 1933."

The opinion of the court does not disclose the basis of these findings but there is no combination of figures in the record which will come anywhere near producing the results found by the court.

The cumulative effect of what the Court of Civil Appeals did in upholding the validity of the order was to deprive appellant of that independent judicial review of both the facts and the law which is essential to a proper judicial review of a rate order claimed to be confiscatory, if appellant is to be afforded the equal protection of the laws and due process of law guaranteed to it by Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Ohio Valley Water Company v. *Ben Avon Borough, supra; St. Joseph Stockyards Company* v. *United States, supra; Baltimore & Ohio Railroad Company* v. *United States, supra.*

The substantial nature of the questions involved is apparent when it is considered that there is evidence in this record of two years actual operation under the assailed order and such order was upheld by the court below only by departing from the standards of judicial review established by this court for cases of this nature and deciding Federal questions in a manner inconsistent with prior decisions of this court. Necessary fact findings were entirely absent in the courts below and such as were made were without evidence to support them. Not only is appellant entitled to relief in this court from the clearly shown confiscation of its property, but the nature of the State court's departure from the standards of judicial procedure laid down by this court are such as to require correction by this honorable court. The correction of these errors is all the more important because, under the Johnson Act (Subd. (1), Section 41, Title 28, U. S. C., as amended May 14, 1934) confiscation cases now will ordinarily be first tried out in the courts of the States. Unless the State courts are required by this Court to accept and follow the standards of procedure heretofore established by this Court, and to follow this Court's requirements with respect to findings of fact on essential issues, the burdens of this Court on appeal will be increased and the rights of litigants in rate cases gravely impaired.

Cases Supporting Jurisdiction.

In addition to the cases cited above the following support the jurisdiction of this honorable Court:

(*a*) The rate reduction and refund order of the Railroad Commission of Texas is a statute of the State within the meaning of Sec. 344 (a), Title 28, United States Code.

Williams v. *Bruffy*, 96 U. S. 176, 182-184;

Bluefield Co. v. *Pub. Serv. Com.*, 262 U. S. 679, 683;

Live Oak Assn. v. *R. R. Com.*, 269 U. S. 354, 356;
King Manufacturing Co. v. *City Council of Augusta*, 277 U. S. 100, 112-114;
West Ohio Gas Co. v. *Comm'n.* (No. 1), 294 U. S. 63.

(*b*) The judgment appealed from is a final judgment in the highest court of the State in which a decision could be had:

Bacon v. *Texas*, 163 U. S. 207, 215;
Sullivan v. *Texas*, 207 U. S. 416, 422;
San Antonio & A. P. R. Co. v. *Wagner*, 241 U. S. 476, 477.

Opinions Appended.

The opinion of the Court of Civil Appeals entered October 30, 1935 (unofficially reported 89 S. W. (2) 1094), is attached hereto as Appendix "A"; and the opinion of the Railroad Commission of Texas entered June 13, 1933 (unofficially reported 2 P. U. R. (N. S.) 503), is attached hereto as Appendix "B". No other opinion was entered by the Court of Civil Appeals, and no opinions have been entered either by the trial court or by the Supreme Court of Texas.

The above and foregoing is presented by United Gas Public Service Company, together with its petition for the allowance of an appeal in this case to the Supreme Court of the United States, as its separate typewritten statement, particularly disclosing the bases upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review said final judgment of the Court of Civil Appeals.

Dated this 15th day of January, 1937.

JOHN P. BULLINGTON,
F. G. COATES,
Counsel for Appellant,
United Gas Public Service
Company.

APPENDIX A.

OPINION OF THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF TEXAS—Rendered October 30, 1935.

No. 8176

UNITED GAS PUBLIC SERVICE COMPANY, Appellant,

v.

THE STATE OF TEXAS ET AL., Appellees.

Appeal from District Court of Travis County.

In February, 1909, the City of Laredo granted certain individuals a 25-year franchise to construct and operate a natural gas distribution system in said city. The franchise and all rights thereunder were acquired by appellant through the mesne conveyances of several predecessors. The ordinance and some of the orders and proceedings here involved occurred before appellant acquired the franchise; but it is bound by them, and will be considered as having owned and operated the franchise at all times.

From the year 1921 to December, 1931, the natural gas rate for domestic use in Laredo was 75c. per M C. F., with 10% discount if bill was paid within 10 days from date, and with a minimum monthly bill of $1.00 per customer. On December 15, 1931, the City of Laredo, a Home Rule chartered city, acting under the authority given by Art. 1175, R. S. 1925, by ordinance fixed the natural gas rate for domestic use at 40c per M C. F., with 10% discount if bill was paid in 10 days, and with a minimum monthly bill of $1.00 per customer, the ordinance providing that the rate would be effective from January 1, 1932. An appeal under Art. 6058, R. S. 1925, was perfected from the ordinance to the Railroad Commission. Appellant filed a bond in the sum of $20,000.00, conditioned that it would refund any excess rates over the rates finally determined to be fair and reasonable. Pending said appeal appellant filed an application for an increase of the 75c. domestic rate, which was not acted upon by the City of Laredo because of the

pendency of the matter before the Commission; and thereafter appellant perfected an appeal, based on this application to the Commission, filing a bond conditioned as the one in the first appeal. The Commission consolidated the two appeals, heard them on their merits, and on June 13, 1933, promulgated its order fixing the natural gas rate for domestic use at 55c. per M C. F., with minimum monthly bill of $1.00 per customer. The order provided for a 10% penalty if bill was not paid within 10 days from date; provided that the 55c. rate would be effective from January 1, 1932; and further provided that appellant refund to the customers the difference in the amount collected after January 1, 1932, under the 75c. rate and the 55c. rate, appellant having continuously collected the 75c. rate.

On June 29, 1933, appellant filed its bill in equity in the Federal District Court, naming the members of the Railroad Commission, the Governor, the Attorney General, and the City of Laredo and its governing officials as defendants, seeking to restrain them from enforcing the 55c. rate pending a hearing of the matter by a statutory Federal court of three judges; alleging that because the 55c. rate would not afford appellant a reasonable return on the fair value of its property used in the public service, the rate order was confiscatory, and in violation of the just compensation, the equal protection, and the due process clauses of the Federal Constitution.

On July 26, 1933, appellees, the parties named as defendants in appellant's suit in the Federal court, filed this suit in the District Court of Travis County, alleging that appellant had filed its aforementioned bill in equity in the Federal court, and that appellees brought this suit in the nature of an appeal under the terms of Art. 6059, R. S. 1925; "but that such appeal is not taken because plaintiffs (appellees) are dissatisfied with the rates and charges prescribed in the Commission's said order, but primarily for the purpose of protecting the jurisdiction of the court and its venue to hear and finally determine the matters in controversy, and to enforce the said order, if it should be deemed to be valid upon final hearing," which order appellant was alleged to have continuously violated since its

promulgation; and prayer was that appellant be enjoined from charging or collecting any rates for natural gas in excess of the 55c. rate fixed by the Commission, and that the City of Laredo recover for the consumers the difference in the amount collected under the 75c. rate and the 55c. rate. Appellees also requested that pending the final determination of the cause, an order be entered staying all proceedings by the Commission or City of Laredo in the collection of the 55c. rate; which order was entered by the State District Court on the date the petition was filed.

On August 1, 1933, appellant and appellees appeared before the statutory three-judge Federal court and appellees' motion to stay all proceedings in that cause until final disposition of the Travis County District Court cause was granted; the statutory Federal court also enjoined the enforcement of the 55c. rate, "pending the final disposition of the cause" in the State District Court. On the date of this stay order by the three-judge court, appellant filed its petition in the Federal District Court, praying for the removal of the cause from the State to the Federal court. Appellees answered with a motion to remand the cause to the State Court; which motion was granted.

In the State court appellant filed an answer, attacking the 55c. rate, alleging that the rate order was based on assumption contrary to the facts with regard to the average annual revenues of appellant, and was therefore not supported by any evidence; and that because the 55c. rate did not yield a net return of 7% per annum from January 1, 1932, down to the date of the trial (in April, 1934), and would not yield a reasonable return on the fair value of the property used in the public service, the rate order was therefore unjust and unreasonable and confiscatory, and in violation of the just compensation, the equal protection, and the due process clauses of both the State and Federal Constitutions; and prayer was that the appellees be restrained from enforcing the alleged void order.

Under the pleadings and proceedings, the suit filed by appellees in the District Court of Travis County was merely one to bring appellant within the jurisdiction of the State court as provided for by Sec. 266 of the Judicial Code of

the United States (28 U. S. C. A., Secs. 368 *et seq.*), in order to determine the validity of the 55c. rate; and the amended answer of appellant therein, seeking to enjoin the enforcement of the 55c. rate, was in effect an appeal by it under Art. 6059, to determine whether the rate order was unjust and unreasonable as to appellant; and to determine the additional question of whether the enforcement of the rate would result in confiscation of appellant's property used in the public service, rendering the rate order unconstitutional. Upon the issues thus joined in the State court a trial was had to a jury. The court's charge consisted of definitions and instructions, and the following special issue:

> "Do you find that the order of the Railroad Commission of Texas bearing date June 13, 1933, providing for a $0.55 gas rate to residential consumers within the City of Laredo, Texas, under the facts introduced in evidence before you, is unreasonable and unjust to defendant United Gas Public Service Company? Answer this question 'Yes,' or 'No'."

The jury answered the issue "No." Accordingly, the judgment enjoined appellant from charging rates in Laredo in excess of the 55c. rate fixed by the Commission, until changed by the Commission or other authorized authority; dissolved the stay order of June 26, 1933; and provided for a suspension of the judgment upon the perfecting of an appeal and the filing of a supersedeas bond in the sum of $30,000. The judgment declared the Commission's order fixing the 55c. rate to be valid, except that portion making the 55c. rate effective from January 1, 1932, and for a refund of the difference between the 75c. rate and the 55c. rate, but without prejudice to any rights for the collection of such difference in rates should the 55c. rate be held valid on appeal. Appellant has appealed from the portion of the judgment enjoining it from charging in excess of the 55c. rate, and has filed a supersedeas bond. Appellees have appealed from the portion of the judgment denying a recovery of refunds.

Appellant briefs the appeal in two parts. In "Part I" and by propositions 1 to 10, appellant seeks to have the

judgment below reversed and judgment rendered for it. In "Part II" of the brief and by propositions 11 to 79, appellant contends that the judgment should be reversed and the cause remanded, because of several alleged errors of practice.

We have reached the conclusion that appellant not only failed to establish its claim for reversal and rendition of judgment in its favor, but that when viewed in the light of the presumption in favor of the validity of the Commission's rate order, and of the *quantum* and character of proof required to overcome such presumption, the evidence adduced was insufficient, as a matter of law, to show that the 55c. rate order was either unjust and unreasonable or confiscatory. In view of this conclusion, all questions of practice presented in "Part II" of the brief go out of the case.

The Commission found in its rate order that the fair value of appellant's property used in the public service as of August 1, 1932, was $885,000; that a 3% annual reserve accrual for depreciation on such valuation was fair and reasonable; and that a 7% annual return on such valuation of the property was fair and reasonable; and that a gas rate of 55c. for domestic use was fair and reasonable. However, the Commission reluctantly included in the property valuation an item of $124,688, representing the Pescadito-Jennings Transmission pipe line of approximately 26 miles, which was only used one day during the last 12 months of the operating period, and which the Commission found could "neither be safely nor profitably used in transporting gas" to Laredo. The Commission also included the West Jennings Gathering System at a value of $10,342, although it found that these "two property items are neither used nor are they necessary as standby equipment." There was also evidence before both the trial court and the Commission, which tended to show the fair value of appellant's property to be about $700,000; and that a 2% annual accrual for depreciation would be fair and reasonable. Appellant's witnesses placed its value at slightly over one million dollars. When the properties serving Laredo were transferred to appellant by its subsidiary and predecessor in title, Texas Border Gas Company, on October 31, 1932, the journal entry

on appellant's books reflected a total value of $934,798.02, with a reserve for depreciation of $78,632.20, which included the Roma-Jennings pipe line not servicing Laredo, and which with other property was valued on the books of appellant's predecessor in title in 1929, at $848,232.98. The separate value of the Roma-Jennings pipe line was not shown; but based upon these book entries and other facts, the expert witness for appellees arrived at his $698,047 present valuation of appellant's property used in servicing gas in Laredo.

On the hearing before the Commission the operating revenues and operating expenses for slightly more than four fiscal years next preceding the hearing were used. This operating period extended from June 30, 1928, through July 31, 1932, the four fiscal years being the three twelve-month periods ending, respectively, June 30, 1929, 1930 and 1931, and the twelve-month period ending July 31, 1932. The reasons stated by the Commission in the rate order for using said operating periods and employing the method used are, as follows:

> "The Company presented a 'set up' of operating revenues and expenses for the 12 months period ending July 31, 1932, only, for consideration in the computation of a fair return upon its plant value. On the other hand, the City presented a similar 'set up' covering the years ending June 30, 1929, 1930 and 1931, and for the last year ending July 31, 1932, a period of four years; it contended that since the year ending July 31, 1932, was patently a subnormal business year, such single year should not be taken alone as the test period for the computation necessary. It is our opinion that the one year ending July 31, 1932, should not be taken as the test period. It is a matter of common knowledge, we believe, that from a general business standpoint, the year 1932 was the worst year since 1929. The City's Exhibit L shows that the fiscal year 1931, in comparison with the years immediately preceding it, was subnormal also; therefore, the year 1931 should not be taken as the test period, nor should an average of these two years be taken.

"Just as it would be unfair to the City to take 1932, or 1931, alone, or an average of both, as the test period, it would be unfair to the Company to take the year 1930, or even an average of the three years 1930, 1931 and 1932, as the test period, as it is shown that the year 1930 was the best year, in point of gross revenues, that the Company had experienced since 1928.

"The year 1929, while it was a better year than 1931 in point of gross revenue by $27,168, was a leaner year than 1930 by $38,153; its inclusion in the test period tends to equalize the effect of the inclusion of the better year, 1930.

"Therefore, in the light of ample lawful precedent for the taking of an average of four successive years immediately preceding the date of the investigation, as the test period, and because in so doing we believe that justice is done to both parties, we are of the opinion and hold that an average of revenues and expenses for the four fiscal years 1929, 1930, 1931 and 1932, constitutes the test period for the computation of the rate stucture upon which a fair return is to be predicated."

The gross revenues and their sources for the four fiscal years as obtained from appellant's calculations were, as follows:

"12 Months Ended.	Central Pow. & Lt. Co. & Motor Fuel Products Co.	Other Sources.	Total.
June, 1929.....	$68,188.69	$222,516.93	$290,705.62
June, 1930.....	91,603.56	237,989.24	329,592.80
June, 1931.....	56,415.13	206,577.17	262,992.30
July, 1932.....	15,398.30	179,126.27	194,524.57"

The total operating revenues, operating expenses and net revenues as obtained from appellant's calculations for the four years were, as follows:

	"Year Ended June 30, 1929.	June 30, 1930.	June 30, 1931.	July 31, 1932
Op. Revenues.....	$290,705.62	$329,592.80	$262,992.30	$194,458.09
Op. Expenses.....	$141,253.38	$167,261.38	$133,644.64	$114,149.62
Net Revenue.....	$149,452.24	$162,331.42	$129,347.66	$ 80,308.47"

The gross revenues and their sources for the additional operating period used in the trial court on appeal were, as follows:

"12 Mos. Ended.	Revenues from Central Power & Lt. Co. and Motor Fuel Prod. Co.	Other Revenues.	Total.
Dec. 31, 1932.....	$8,790.20	$174,987.21	$183,777.41
Dec. 31, 1933.....	54.40	158,699.24	158,753.64"

The decrease in industrial revenues was because the Motor Fuel Products Company had ceased to do business, due to large operating losses; and because the Central Power & Light Company had completed and put in operation in Laredo its main transmission line from its central operating plant at another point, the Laredo plant, which appellant served with gas for fuel, had become a mere emergency or standby plant, and will not hereafter be used except for short periods during emergencies.

Based upon the aforementioned evidence, an expert accountant employed by the appellees, after deducting the non-recurring industrial revenues and certain questioned items of expenses, computed the net returns for each of the (5) twelve-month operating periods, ending June 30, 1929, 1930, 1931, July 31, 1932, and December 31, 1933, respectively, and averaged the annual net operating revenues available for the five years, as follows:

	12 Mo. Period Ending June 30, 1929.	12 Mo. Period Ending June 30, 1930.	12 Mo. Period Ending June 30, 1931.	12 Mo. Period Ending July 31, 1932.	12 Mo. Period Ending Dec. 31, 1933.
Gross Operating Revenues.....	$290,705.62	$329,592.80	$262,992.30	$194,458.09	$158,822.62
(S. F. Vol. III, p. 1786.)					
Less Non-recurring Revenues.....	68,188.69	91,603.56	56,415.13	15,398.30	54.40
(S. F. Vol. IV, p. 2115.)					
Total Recurring Revenue:.....	$222,516.93	$237,989.24	$206,577.17	$179,059.79	$158,768.22
(S. F. Vol. II, pp. 1083–84.)					
Gross Operating Expenses.....	$141,253.38	$167,261.38	$133,644.64	$114,149.62	$93,298.46
(S. F. Vol. III, p. 1786.)					
Less Non-Recurring Gas Purchases.....	22,885.04	29,529.98	21,274.18	4,176.46	.....
(S. F. Vol. II, pp. 1083–84.)					
	$118,368.34	$137,731.40	$112,870.46	$109,973.16	$93,298.46
Less Questioned Items of Operating Expenses....	9,663.33	16,541.54	20,198.69	27,347.05	.....
(S. F. Vol. III, p. 1795.)					
Total Net Operating Expenses:.....	$108,705.01	$121,189.86	$92,171.77	$82,626.11	$93,298.46
			Recapitulation.		
Total Net Recurring Revenue:.....	$222,516.93	$237,989.24	$206,577.17	$179,059.79	$158,768.22
Less: Total Net Operating Expenses:.....	108,705.01	121,189.86	92,171.77	82,626.11	93,298.46
Net Available Return:.....	$113,811.92	$116,799.38	$114,405.40	$96,433.68	$65,469.76

Average Annual Net operating revenue for the Five 12 months' period	$101,384.02
Average Annual Net operating revenue for the Four 12 months' periods, which 4 periods were presented in evidence before the R. R. Commission (June 30, 1928, to July 31, 1932)	$110,362.59
Average Annual Net operating revenue for the Three 12 months' periods ending June 30, 1931, July 31, 1932, and Dec. 31, 1933	$92,102.94
Average Annual Net operating revenue for the Two 12 months' periods ending July 31, 1932, and Dec. 31, 1933	$80,951.72

In applying the several average annual net operating revenues appearing above, the following average Annual Rates of Return are found:

1. Average net operating revenue for the Five 12 months' periods	$101,384.02
Less annual depreciation @ 3% on $885,000.00	26,550.00
Amount available for return at existing rates	$74,834.02

Average Annual Rate of Return, i. e., $885,000.00 divided into $74,834.02, equals 8.46%.

2. Average net operating revenue for the Four 12 months' periods, which 4 periods were presented in evidence before the Railroad Commission (June 30, 1928, to July 31, 1932)	$110,362.59
Less annual depreciation @ 3% on $885,000.00	26,550.00
Amount available for return at existing rates	$83,812.59

Average Annual Rate of Return, i. e., $885,000.00 divided into $83,812.59, equals 9.47%

3. Average operating revenue for the Three 12 months' periods ending June 30, 1931, July 31, 1932, and Dec. 31, 1933	$92,102.94
Less 3% annual depreciation (S. F. Vol. III, p. 1745)	26,550.00
Amount available for return at existing rates	$65,552.94
Average Annual Rate of Return, i. e., $749,990.00 (Tr. pp. 25 and 36) divided into $65,552.94, equals	8.74%
Average Annual Rate of Return, i. e., $885,000.00 divided into $65,552.94, equals	7.41%
4. Average operating revenue for the Two 12 months' periods ending July 31, 1932, and Dec. 31, 1933	$80,951.72
Less 3% annual depreciation (S. F. Vol. II, p. 1430)	25,000.00
Amount available for return at existing rates	$55,951.72
Average Annual Rate of Return, i. e., $700,000.00 divided into $55,951.72, equals	7.99%
Average Annual Rate of Return, if the items of $124,668 and $10,342 (Total $135,010) which were considered by the Commission as neither used and useful, nor necessary (Tr. pp. 25 and 36) are deducted from the rate base of $885,000; $749,990 divided into $55,951.72, equals	7.46%

Appellees offered evidence tending to show that if the 55c. rate had been actually put into effect, it would have produced approximately 1,500 additional meters, at $1.00 per month minimum, and would have increased the use of gas by present consumers. Appellant's evidence tended to

show that any such increase in revenues because of the lower rate was speculative. Appellant has continuously charged and collected the 75c. rate.

The exact calculations on which the Commission computed the 55c. rate do not appear in its rate order, nor in the record on appeal. But appellant insists that it appears from the opinion that the Commission found the fair value of the property to be $885,000, its annual depreciation to be 3%, and 7% to be a reasonable annual return thereon, and applied such findings to the average net revenues received by appellant in the four fiscal years used in the hearing. Appellant contends that "the practical result of using this device was to greatly overstate the net revenues actually being received from existing rates at the date of inquiry, to assume that revenues which had stopped coming in were still being collected, and to apply revenues received during an era of good business, rapid growth and a higher level of prices of construction labor and material to a rate base determined at depression prices, and to test requirements for return at the percentage therefor fixed in consideration of depressed business conditions." And by propositions 1 to 10, appellant in one way or another, contends that the evidence showed, as a matter of law, that the 55c. rate order was confiscatory, and *per se* unjust and unreasonable, on two grounds, as follows:

1. That because the existing 75c. rate did not yield a 7% return on the $885,000 valuation of the property from January 1, 1932, the effective date of the city ordinance, to December 31, 1933, or down to the date of the trial in April, 1934, the lower 55c. rate would necessarily not yield a reasonable return on appellant's property.

2. That in making its calculations for the 55c. rate the Commission assumed that appellant's revenues from January 1, 1932, would equal its revenues for the period beginning, June 30, 1928, and ending July 31, 1932, which assumption was contrary to the facts, because it was assumed that the revenues from the two industrial sources which had stopped coming in were still being collected, and because of existing depression conditions, revenues had de-

creased, and for which reasons the 55c. rate would not afford a reasonable return on the fair value of appellant's property.

The contention that the rate order is unenforceable because the existing 75c. rate did not yield a 7% return on the $885,000 property valuation from January 1, 1932, to December 31, 1933, the lower 55c. rate would necessarily not afford a reasonable return, is not sustained. The year ending December 31, 1933, was the last fiscal year of the five-year period of business operations used in the trial court. It was admittedly an abnormal year, because of high temperature prevailing during the winter months; and because of a decrease in the purchasing power of consumers, due to the business depression prevailing everywhere. The rule is settled that rates are not based upon the results of business of any one year alone, but upon what is estimated as being the average business over a period of years; the future being gauged as nearly as possible by the past experience. The reason for the rule is the fact that any business may fluctuate from year to year because of changing conditions or circumstances which may affect it; ordinarily, a test of five years or more next preceding the inquiry, if available, is selected. It is also the rule that only actual experience under the rate complained of can furnish any real criterion or guide as to the effect of the rate on the business; and that this experience should be obtained by a practical test for such a period of time as will under the facts of the particular business determine the matters which are of doubtful or uncertain influence. In absence of an actual test of the rate, the court on appeal must resolve all doubts against the complaining party; pare down valuations unsparingly; and the rate must appear to be clearly confiscatory, or unjust and unreasonable before the court should by injunction restrain its enforcement in advance of actual experience of the practical results of the rate. And while the equal protection, the due course, and the due process clauses of the fundamental laws of both state and nation guard against the taking of, or compelling of the use of private property for public service without just compensation, still they do not assure the public utility the right

under all conditions and circumstances to have a return upon the value of the property so used. If actual experience for a proper period of time under the rate complained of should reveal sufficient reasons, the rate order may then be changed through proper channels. Knoxville v. Knoxville Water Co., 212 U. S. 1; Wilcox v. Consolidated Gas Co., 212 U. S. 19; Public Service Com. v. G. N. Utility Co., 289 U. S. 130; Georgia Power Co. v. Com., 262 U. S. 625; Louisville v. Cumberland Tel. & Tel. Co., 225 U. S. 430; Brush Electric Co. v. City of Galveston, 262 U. S. 443; Reno P. L. & W. Co. v. Com., 298 Fed. 790; Los Angeles Gas & Electric Cor. v. Com., 58 F. (2) 256 (affirmed 289 U. S. 287); Denver Union Stockyards Co. v. United States, 57 F. (2) 735; St. Joseph Stockyards Co. v. United States, 11 Fed. Sup. 322.

In the instant case appellant has continuously charged and collected the 75c. rate; hence no actual test has been made under the lower 55c. rate. An actual test of the lower rate might have resulted in a larger return, by bringing about an increase in appellant's business, and manifestly this court would not be warranted in holding that the lower rate was either confiscatory, or unjust and unreasonable, as a matter of law, in advance of an actual test of the rate; but that under the aforementioned rules as applied to the facts, appellant failed, as a matter of law, to show the rate either confiscatory or unjust or unreasonable. The $885,000 valuation of appellant's property by the Commission was extremely liberal, because it included at a valuation of more than $135,000 the two pipe lines which the undisputed evidence showed to be useless except as emergency or standby equipment, and their value for such purposes was not shown. So when the property valuation is pared down to this lowest valuation (about $700,000), and doubtful items of expenses are deducted, the net revenues received by appellant under the 75c. rate for the year ending December 31, 1933, would afford more than a 11% return. And calculations based on the $700,000 valuation and the estimated difference in revenues between the 55c. rate and the 75c. rate, show a return of more than 7% for the year 1933. But even if the lower rate did not or would not yield a return of 7% for the year 1933, this court would not be warranted in enjoining

the enforcement of the rate, because the test period was too short, no actual test was made under the lower rate and the undisputed evidence showed the year to be abnormal.

Nor do we sustain appellant's second above stated ground, as showing that the 55c. rate would not as a matter of law afford a reasonable return on its property, because the Commission assumed, contrary to the evidence showing loss of non-recurring industrial revenues and decreasing revenues during the year 1932, that the revenues from and after January 1, 1932, would equal the average revenues for the June, 1928, to July, 1932, period used in the calculation fixing the 55c. rate. If by this proposition appellant contends that only the operating revenues and expenses for the year ending July 31, 1932, should have been used by the Commission in making its calculations and in fixing the 55c. rate, then we have hereinabove determined the question against appellant.

Nor do we sustain the ground urged, if it is the contention of appellant that the Commission erroneously based its calculations in fixing the 55c. rate upon the average net revenues for the four fiscal years used by it, because the "practical result of using this device was to greatly overstate the net revenues actually being received from existing rates at the date of inquiry, to assume that revenues which had stopped coming in were still being collected, and to apply revenues received during an era of good business, rapid growth and a higher level of prices of construction labor and material to a rate base determined at depression prices, and to test requirements for return at the percentage therefor fixed in consideration of depressed business conditions."

As hereinabove stated, the calculation upon which the Commission based the 55c. rate order is not shown in the evidence; nor does it appear to be material on this appeal as to what method or calculation the Commission used, because the only ground alleged by appellant as showing the rate order to be either confiscatory or unjust and unreasonable was that the 55c. rate would not afford a reasonable return on the fair value of appellant's property used in the public service. Under our statutes and practice, the trial of both of these issues on the appeal to the court is

de novo, and is controlled by the principles governing the scope of a court review on appeal of the legislative function of the Commission in making or fixing a public utility rate. Lone Star Gas Co. v. Commission, — S. W. (2d) —, recently decided by this court, in which case we discussed at length the scope of judicial appellate review of a public utility gas rate fixed by the Commission. Suffice it to say here that rate-making is essentially a legislative function; that rates fixed by the Commission have the same force and effect of statutes and are subject to court review to the extent only as statutes of the same import are so subject, with the additional statutory authority of the court to determine whether the rate is unjust and unreasonable, and the inherent power of the court to determine the constitutional question of confiscation. M., K. & T. Ry. Co. v. Commission, 3 S. W. (2d) 489, affirmed 13 S. W. (2d) 678. That the rate fixed by the Commission is presumed to be valid, reasonable and just until declared otherwise by a court of competent jurisdiction. R. R. Commission v. Uvalde Construction Co., 49 S. W. (2d) 1113. That in order to overcome this presumption in favor of the validity of the rate on the constitutional ground of confiscation, the burden of proof rests heavily upon the complaining party. Dayton Power & Light Co. v. Commission, 292 U. S. 290, 79 L. Ed. 832. That in order to set aside the rate as being unjust and unreasonable, the statute (Art. 6059) requires the complaining party to show "by clear and satisfactory evidence that such rate is unreasonable and unjust." That the complaining party attacking a rate as being unreasonable and unjust must allege facts which if proved would show the rate to be unjust and unreasonable as a matter of law; and to prove by clear and satisfactory evidence "which leaves no reasonable doubt in the judicial minds that the rate is unjust and unreasonable." R. R. Commission v. Weld & Neville, 96 Tex. 409; R. R. Com. v. Galveston Chamber of Commerce, 105 Tex. 101, 145 S. W. 573. That in advance of any actual test of the practical result of the new rate, the court on appeal will not disturb the rate where it is based upon conflicting evidence as to valuations of property, or as to any other item used as a basis for the calculation of the rate; because to do so would merely sub-

stitute the findings of the court or jury upon conflicting evidence for that of the Commission, and would therefore permit the court to exercise the legislative function of rate-making. R. R. Commission v. Shupee, 57 S. W. (2d) 295, affirmed 73 S. W. (2d) 505. And that by "resolving all doubts against" the appellant, "and using valuations pared down unsparingly," there would have been no reasonable doubt in the judicial mind that the 55c. rate was neither confiscatory nor unjust and unreasonable. Newton v. Consolidated Gas Co., 258 U. S. 165, 66 L. Ed. 547.

The auditor for Laredo showed in his above quoted calculations that the average net revenue for the five-year period used in the trial court, less annual depreciation at 3% on the $885,000 valuation of appellant's property, would yield an average annual return of 8.46%. If under the rule that in absence of any actual test of the new rate, the court must resolve all doubts against appellant, and pare down unsparingly valuations, and if the lowest valuation shown by the evidence (about $700,000) is used in the calculation, then the average net return received by appellant under the existing rate for the five-year period, would yield an average annual return of more than 10%. The same calculations of the auditor also show that if the average net revenues for the four-year period used in the hearing before the Commission are utilized, such revenues, less 3% on the $885,000 valuation of appellant's property, would yield an average annual return of 9.47%. If the lower $700,000 valuation is used in the calculation, the average net revenues for the four-year period would yield a return of more than 11%. Thus it was shown that under the existing rate appellant has received an average annual return, even through several depression years, of about 11% on the value of its property used in the public service. And since an actual test of the new rate may bring in a larger return, by bringing about an increase in business, we do not feel warranted in setting the rate aside in absence of an actual test under the new rate. Brush Electric Co. v. City of Galveston, 262 U. S. 443. And manifestly the evidence of appellant did not show, as a matter of law, that the lower 55c. rate would necessarily result in confiscation of its property; nor that the rate was unenforceable be-

cause unjust and unreasonable, when viewed in the light of aforementioned rules with regard to the quantum and character of proof required in such cases.

The rate order of the Commission, dated June 13, 1933, provided that the 55c. rate fixed by it should be effective from and after January 1, 1932, the effective date of the ordinance of the City of Laredo, which fixed the rate of 40c. The Commission's order further provided, as follows:

> "It is further ordered by the Railroad Commission of Texas that the Texas Border Gas Company shall refund to the City of Laredo, for the benefit of the domestic consumers, the difference between the amount collected by the Border Gas Company and the amount that would have been due by domestic consumers under this order."

The trial court declared this provision of the rate order invalid and of no force and effect; but without prejudice to the rights of the City of Laredo to bring suit for the refund "should this provision be held valid upon final determination of this cause on appeal." By cross-assignments of error appellees seek to have this portion of the trial court's judgment reformed so as to declare said provision for the refund valid and enforceable.

We have reached the conclusion that the provision of the rate order making the 55c. rate retroactively effective as of January 1, 1932, and providing for the refund of any amount collected in excess thereof is valid and enforceable. The authority to initiate the proceeding to reduce the gas rate is in the City of Laredo under Art. 1175, and the utility is given the right of an appeal from the ordinance fixing the rate to the Commission under Art. 6058, the material portions of which read, as follows:

> "When a city government has ordered any existing rate reduced, the gas utility affected by such order may appeal to the Commission by filing with it on such terms and conditions as the Commission may direct, a petition and bond to review the decision, regulation, ordinance, or order of the city, town or municipality.

> Upon such appeal being taken the Commission shall set a hearing and may make such order or decision in regard to the matter involved therein as it may deem just and reasonable. The Commission shall hear such appeal de novo."

The appeal to the Commission under the terms of this article is essentially to review the city ordinance fixing the gas rate, and since it "may make such order or decision in respect to the matter (rate) involved therein as it may deem just and reasonable," the Commission's functions are not only legislative but quasi-judicial as well. In the exercise of these reviewing and quasi-judicial functions the Commission is authorized to suspend, pending the appeal before it, the rate fixed by the city ordinance, and to require the utility to give a bond "on such terms and conditions as the Commission may direct." Accordingly on the appeal to the Commission, appellant filed its bond, which was approved and accepted by the Commission, and which bond was conditioned as follows:

> "* * * principal and surety shall refund and pay to the City of Laredo for the benefit of the consumers in said city, any excess of rates or charges collected by the principal * * * over and above the rates or charges that shall be finally determined a fair and reasonable return. * * *"

The supersedeas bond filed in this appeal is similarly conditioned.

Since the Commission had the power to suspend the reduced city ordinance rate pending the appeal, it necessarily had the power to reinstate such rate if found to be just and reasonable as of its original effective date. Likewise the Commission had the power upon determining that the city ordinance rate was unjust or unreasonable, to substitute its own just and reasonable rate therefor, and to make it effective as of date of the city ordinance rate for which it was substituted.

It is further manifest that the powers given the Commission by Article 6058 to review a city ordinance rate on ap-

peal and to determine its justness and reasonableness, and if found to be unjust and unreasonable, to substitute its own just and reasonable rate therefor, are not only legislative and administrative functions, but quasi-judicial as well; and in the full exercise of such power it necessarily follows that the Commission had the power to make its own rate effective as of the date of the city ordinance rate, which it has reviewed and adjudicated as being unjust and unreasonable. See as dealing with quasi-judicial functions of utility commissions: Producers Refining Com. v. M. K. & T. Ry. Co. (Com. App.), 13 S. W. (2d) 680; Baer Bros. Merc. Co. v. Denver & R. E. Ry. Co., 233 U. S. 479; L. & M. Ry. Co. v. Finn, 235 U. S. 601. And since the Commission's functions are essentially to review and adjudicate the justness and reasonableness of the city ordinance rate on appeal, its jurisdiction necessarily relates back to the date of the initial proceedings in which the city ordinance rate originated and first became effective. The rule is settled that a public utility commission has the power to make its rate order retroactively effective as of any date after it has actually acquired jurisdiction of the cause; and in consequence may order the refund of excessive rates paid from and after the retroactively effective date of the rate order. See State ex rel Boynton v. Public Service Commission of Kansas, P. U. R. 1933a 415; State v. Public Service Commission (Mo.), 272 S. W. 957; Ill. R. R. Co. v. Best, 39 F. (2d) 658.

In accordance with our above conclusions, the judgment of the trial court is reformed so as to also declare the retrospective effective date and refund provision of the rate order of the Commission valid and enforceable, and as thus reformed the judgment of the trial court will be affirmed.

Reformed and affirmed.
Filed October 30, 1935.

M. B. Blair,
Associate Justice.

APPENDIX B.

BEFORE THE RAILROAD COMMISSION OF TEXAS.

Gas Utilities Docket No. 49.

IN RE THE APPEAL OF TEXAS BORDER GAS COMPANY FROM AN ORDINANCE OF THE CITY OF LAREDO, TEXAS,

Joined and heard with

Gas Utilities Docket No. 63.

IN RE THE APPEAL OF TEXAS BORDER GAS COMPANY FROM THE FAILURE AND/OR REFUSAL OF THE CITY OF LAREDO, TEXAS, TO GRANT IT AN INCREASE IN DOMESTIC GAS RATES.

Heard: October 4 to October 11, 1932; November 9 to November 14, 1932.

Opinion and Order.

BY THE COMMISSION:

The City Council of the City of Laredo on December 15, 1931, enacted an ordinance which provides for the fixing of rates for natural gas, as follows:

40¢. per M.C.F. for domestic consumption;
12¢. per M.C.F. for industrial consumption;
30¢. per M.C.F. for hotel and restaurant consumption;
25¢. per M.C.F. for school, church and hospital consumption, and for use is gas engines.

The ordinance further provides for a discount of 10% for payment of bills within ten days of their rendition; and under its provisions, the ordinance became effective January 1, 1932.

At the time of the enactment of the ordinance, the prevailing rate for natural gas for domestic purposes (which rate had prevailed since the year 1921) was 75¢. per M. C. F. with a 10% discount for payment within 10 days, and a minimum monthly bill of $1.00. No fixed rates applied as to non-domestic consumers.

The Texas Border Gas Company, the company furnishing natural gas to consumers within the limits of the City of Laredo, not being satisfied with the provisions of the aforesaid ordinance, filed its appeal with the Commission and posted the required supersedeas bond, all in accordance with the provisions of Articles 6058-6059, R. C. S. of Texas (1925). These Articles provide, in substance, that when a municipality has, by ordinance, reduced existing gas rates the utility affected by such ordinance may appeal to the Commission and perfect such appeal by the filing of a bond conditioned as may be required by the Commission; and that the Commission after a hearing of the matter make such order as it may deem just and reasonable in the premises and that any party at interest, if dissatisfied with the order or orders so made by the Commission may have a further hearing in a District Court of Travis County, Texas.

Prior to the time set by the Commission for the hearing of this cause, the South Texas Gas Company, the company owning and operating the transmission properties and transporting the gas sold to the Texas Border Gas Company at the Laredo City Gate, was made a party to the proceeding.

Subsequently, the Texas Border Gas Company filed its application with the governing body of the City of Laredo for an increase in rates of natural gas supplied to domestic consumers on the following scale:

$1.50 net per month, which $1.50 would entitle a consumer to use 1000 cubic feet of gas during such month;

.90 net per M. C. F. for the next 2000 cubic feet of gas used during such month;

.70 net per M. C. F. for all additional gas used, during such month;

Minimum monthly bill $1.50 net.

No action having been taken on this application by the City of Laredo, at the expiration of 60 days after its presentation, the Texas Border Gas Company took the necessary steps to perfect its appeal to the Commission under the provisions of Article 6058 (supra).

The Commission thereupon entered its order consolidating the two appeals and set the hearing for October 4, 1932.

By agreement of the parties a rate of 5¢ per M. C. F. was stipulated as a fair and reasonable price of gas at the well.

By appropriate pleadings the United Gas Public Service Company, a Delaware Corporation, entered its appearance in both appeals, alleging in substance that it had acquired the properties of both the Texas Border Gas Company and South Texas Gas Company, and that it adopted the pleadings of both of the said companies theretofore filed with the Commission.

The matters at issue were heard by the Commission in hearings held at Laredo from October 4 to October 11, and from November 9 to November 14, 1932, at which time both the Gas Company and the City presented their evidence before the Commission; every phase of the controversy was fully presented, resulting in a stenographic record of some fourteen hundred pages and of more than twenty exhibits containing several hundred pages; and subsequent to the conclusion of the hearing, counsel for both the Company and the City prepared and filed with the Commission exhaustive briefs, which were of particular aid to the Commission to arriving at a just and fair solution of the matters before it, in this cause.

Texas Border Gas Company.

South Texas Gas Company.

Historical.

The Texas Border Gas Company, a Texas Corporation, and its predecessor, the Border Gas Company have been distributing natural gas in the City of Laredo since the year 1909, under a twenty-five year franchise granted by the City in February, 1909. During the year 1910 the original company (Border Gas Company) began and completed the construction of a transmission line from what was known as the Reiser Field, to the Laredo Gate, a distance of approximately 22 miles; during the same year it also constructed a distribution system in the City of Laredo. In the year

1916, the transmission line was extended for a distance of approximately 26 miles to what is known as the Jennings Field; in the years 1922 and 23, an additional transmission line of some 24 miles was laid to the Carolina-Texas Field.

From the year 1909 to April, 1928, the original company, the Border Gas Company, owned and operated the producing, the transmission and the distribution systems, supplying natural gas to the consumers, in the City of Laredo. In the month of April, 1928, that portion of the properties comprising the distribution system was acquired by the Texas Border Gas Company; the Transmission system properties were, at the same time, acquired by the South Texas Gas Company; and the producing wells and other production property were taken over by the South Texas Production Company, which latter company is not a party to these proceedings.

Inter-Related Companies.

Texas Border Gas Company and South Texas Gas Company are operated as units of the United Gas Public Service Company, which latter company is, in turn, a unit of the United Gas System. Both appellant companies are under common stock ownership and are under the same common management and control.

Texas Border Gas Company is a distributor of natural gas not only in the City of Laredo but also in the surrounding territory, which includes a number of small communities situated in that vicinity.

All gas distributed by Texas Border Gas Company in the City of Laredo is purchased by it from the South Texas Gas Company under the terms of a gate rate contract between the two companies, entered into on the 10th day of April, 1928, providing for the following scale of rates:

30¢ per M. C. F. for all gas sold and delivered to domestic consumers;

14¢ per M. C. F. for all gas sold and delivered to industrial consumers.

In view of the inter-related company operation and ownership, the gathering, transmission and distribution proper-

ties used and useful in serving the City of Laredo were appraised and valued as a combined property.

Statement of the Issues.

The major questions which present themselves for determination by the Commission in this case are the following:

1. What is the present fair value of the properties of the company, used and useful in serving the City of Laredo?

2. What is a fair and reasonable annual allowance for depreciation on the property of the company, used and useful in serving the City of Laredo?

3. What is a reasonable rate of return for a company supplying natural gas in the City of Laredo?

4. What schedule of rates will yield that return?

Allocation.

As the distributing company (Texas Border Gas Company) serves not only natural gas consumers in the City of Laredo, but also consumers in a number of other communities situated in the Laredo area, it becomes necessary to allocate to Laredo only that portion of the company's property used and useful in serving the rate payers in such city.

The company's engineer, Greene, applied a method of allocation under which he utilized certain percentages representing the ratio of the volume of gas in M. C. F. delivered to the Laredo City gate, to the total volume of gas delivered within the Laredo district, including Laredo (71.29%); and the ratio of the volume of gas delivered to consumers outside the Laredo district, to the total volume of gas delivered to the Laredo City gate (96.45%).

The city's engineer, Elroad, utilized a weighted average per cent (83.18%), arrived at as an approximate mean between the two percentages used by the company's engineer, Greene.

As neither consumers' demand nor load factor data was available in this case, we are of the opinion, from the evidence before us, that the application of the weighted average percent utilized by the city comes closest to producing

a fair and correct allocation of the properties involved, especially since the properties of the two companies are not being valued separately herein but as a unit.

Present Fair Value, or Rate Base.

Neither in statutory law nor in court decisions have we been able to find any definite, fixed rule, basis or formula for the determination of the present fair value of the property of a utility used and useful in serving the public.

While it is true, as is contended for by the company, that, it is the present fair value of the propetry that is to be determined, still, the application of the "reconstruction cost new" method alone, to the exclusion of other recognized methods and factors; would necessitate a dependence upon "that most unsatisfactory evidence, the testimony of expert witnesses employed by the parties."[1]

Ultimately, in all rate cases the rate making body finds that it must approach the question of "fair value" in the light of the holding of the Supreme Court of the United States as set forth in the case of *Smyth* v. *Ames,* 169 U. S. 546; 42 L. Ed. 819, wherein the court said:

> "And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates as prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property."

The historical cost of the properties, which term necessarily embraces (a) the original cost of construction, (b) the amount expended in permanent improvements, and (c)

---

[1] Knoxville v. Knoxville Water Company, 212 U. S., page 1, 53 L. Ed. 371.

a comparison of the present with the original cost of construction, as enumerated in the *Smyth* v. *Ames* case must, therefore, be given its proper place by the rate making body.

In the present case, the company in adducing its evidence before the commission relied solely upon the reconstruction cost new method, contending that, while historical cost may have a limited evidentiary value in rate cases, it has no proper place in the instant case, because the early records of the company were inadequately kept and, therefore, provide no correct basis upon which to compute such cost.

The city, however, takes the position that the reconstruction cost new, as well as the historical cost methods are equally applicable; and adduced testimony at length, which we believe fully bears out its contention, namely, that both should be given due consideration by the Commission.

Elements of Value.

The company's engineer, Greene, in his appraisal of the properties used and useful in serving the City of Laredo as of August 1, 1932, arrives at the following result:

	R. C. N.	R. C. N., Less Depreciation
Rate base	$1,415,787	$1,231,601

The city's engineer, Elrod, obtains the following results:

	R. C. N.	R. C. N., Less Depreciation
Rate base	$1,029,155	$810,698

In addition, the city adduced evidence showing the depreciated historical cost of the properties as of July 31, 1932, to be $709,991.23.

The properties of the company are divided into three groups: (a) Gathering system; (b) transmission system, and (c) distribution system.

Gathering System.

The company includes in its appraisal two gathering systems—one situated in the East Jennings Field and the other situated in the West Jennings Field. Its appraisal gives the total depreciated cost of the two systems as $15,868.

The city contends that the West Jennings gathering system is the only one of the two that may possibly be useful in serving Laredo and it includes such gathering system at a depreciated cost of $10,342; this accounts for the net difference of $5,526 between the company's and the city's allowance for this item.

Viewed in the light of the evidence before us, the inclusion of the East Jennings gathering system in the rate base herein is not justified.

Transmission System.

The company's appraisal includes an allowance of $635,230 (new) and $532,133 as the depreciated cost of its transmission system.

The city on the other hand allows $553,353 (new) and $383,960 as the depreciated cost of the transmission system, thus showing a difference between the two (in cost depreciated) of the sum of $148,173. Of this latter amount $37,010 is accounted for in the omission by the city of the Aguilares-Oilton line and the remainder is the result of the difference in findings of per cent condition.

While the city includes an allowance, exclusive of telephone line, of $124,668 as the depreciated cost of that portion of the transmission lines extending from Pascadito Junction to the Jennings Field, a distance of approximately 26 miles, the record discloses that this line was used on only one day during the twelve months' period ending July 31, 1932, in transporting gas to Laredo; further, the condition of this line is such that it could neither safely nor profitably transport the necessary volume of gas to the city, and that if the company's properties were reproduced, this section of the line would not, in our opinion, be necessary in transporting the supply of natural gas required by the City of Laredo.

Distribution System.

The company's exhibit makes an allowance of $563,994 (new) and $477,141 as depreciated cost, while the city allows $564,754 (new) and $460,199 as depreciated cost of this portion of the properties. The net difference of $16,942 is, with the exception of the small difference in the sum

of $760, attributable to the divergence of views of the engineers as to present per cent condition.

Working Cash.

The city's engineer, Elrod, allowed the company for cash working capital, or working cash, the sum of $11,157, which figure was computed upon the basis of two months' operating expenses less gas purchases. The company's engineer, Greene, computed the amount claimed, $24,223, on the basis of 60 days' operating expenses, plus prepaid accounts, gas purchases and a minimum bank balance. We believe that this item should be computed on the basis of 45 days' operating expenses, plus the cost of purchased gas; although in the recent opinion of the Ohio Public Utilities Commission, in the case of Re: Columbus Gas & Fuel Company, P. U. R. 1933, A. 337, the rate-making body in that case held that the working cash "should be limited to one and a half months rather than two months, and that the cost of gas purchased (from an affiliated company) should be eliminated."

As both the city and the company are in accord as to the sum allowable for Material and Supplies, this item of value is not at issue.

Going Concern Value.

Of all intangibles entering into the rate structure, the item "going concern value" is manifestly the most elusive and consequently has been allowed in varying percentages under the facts of particular cases, and entirely disallowed in others.

That this item is an element of value, upon adequate proof, to be taken into consideration by the rate-making body in arriving at a fair and proper rate base, is generally recognized. However, in the giving of such requisite consideration it is not essential that the item be given a separate designation or description.

This phase of the question was passed upon by the Supreme Court of the United States in its recent decision in the case of *Los Angeles Gas & Electric Corporation* v. *Railroad Commission of the State of California*, — U. S. P.

77, L. Ed. — (not yet officially reported), wherein the Court, speaking through Mr. Chief Justice Hughes, says:

> "The record affords no adequate basis for criticizing the allowance made by the Commission for materials and supplies and working capital, and thus the entire excess may be regarded as applicable to whatever intangible value the property had as a going concern. The fact that this margin in the rate base was not described as going value is unimportant, if the rate base was in fact large enough to embrace that element."

The Company contends for an allowance of going concern value as follows:

(a) In connection with its gathering system, the sum of $3,122;

(b) In connection with its transmission system, the sum of $70,659; and

(c) In connection with its distribution system, the sum of $81,301; or, a total of $155,082.

The City on the other hand makes no separate allowance for this element of value in its appraisal, contending that its value was capitalized by the Company when it specifically included this item in its purchase cost of the original properties in the year 1910, and was so treated by the Company; further, that the elements entering into its value had been charged to operating expenses by the Company, and that any additional or remaining portion had been fully considered and allowed by it in the manner in which its engineers evaluated the property.

Accrued Depreciation.

(Per Cent Condition).

The amount of accrued depreciation is, or the per cent condition of the properties under consideration, was testified to at length by Engineers Elrod and Shaw for the City and by Engineers Greene and McGary for the Company.

The Company contends that the inspection—or observation—method is the only method to be employed in determining the accrued depreciation or the per cent condition of its properties; and its engineers, in determining the present per cent condition relied solely upon what is known as the inspection method.

On the other hand, the City takes the position that, while the inspection method is of value in determining the amount of accrued depreciation such method cannot be singled out to the exclusion of all other recognized methods; and its engineers employed the inspection method, in combination with what is known as the age-life method of determining the present per cent condition of the properties.

A considerable portion of the distribution system of the Company's properties lies under pavement; all of the engineers testified that due to the impracticability of disturbing the pavements of the City's thoroughfares, no actual physical inspections were made of the structures under pavement. It is evident then, that the determination of the per cent condition of the property lying under pavement, as made by the Company's engineers, was pure speculation, while on the other hand, the determination of the per cent condition of such property by the City's engineers was, to say the least, based upon a reasonable assumption—that of the age and probable life of such elements.

The largest single item of accrued Depreciation, as determined by the City's engineers, was in connection with the Pescadito-Jennings transmission line, laid 16 years prior to the date of the hearing. It was developed that this 6 inch steel line had not been adequately protected with enamel, or other coating, and that the line lay through a territory in which there were many "hot spots", or areas of soil of a highly corrosive nature, and that in these areas, the pipe was practically of zero value. The dollar difference in this one item alone, in the amounts of depreciation deducted by the Engineers for the Company and for the City is $53,289. If this difference were eliminated, the respective per cent conditions would be:

Company	84.1%
City	80.5%
Difference	3.6%

Engineer McGary's testimony disclosed that he had encountered only one of the many "hot spots" along this line; nor was Engineer McGary concerned about how many such "hot spots" there might be. While his methods of determining per cent condition may be used in highly technical laboratory work, we are of the opinion that if they form the sole basis of the calculations made, they are very impracticable, in the field.

Engineers Elrod and Shaw testified as to the condition of the Pescadito-Jennings transmission line and concomitant structures from actual inspection, coupled with the consideration of the age of the pipe, the character of its protective coating, and the character of the soil in which it was laid.

After viewing the testimony of the respective Engineers, the methods employed by each, and the conditions encountered, we find that the over-all per cent condition of the properties is 78%.

Annual Allowance for Future Depreciation.

The estimation of the annual rate of depreciation is of importance; however, a consideration of what rates have been allowed in other cases, while enlightening, is not of great value here, as each case is in some measure different from each other case, and depends upon the facts of the particular case. Since there is no established rule or formula upon which to proceed with certainty in the matter, we believe that the past experience of the company itself, affords a criterion that merits our consideration.

The only evidence in the record of the past experience of the Company with respect to its actual requirements for retirements is provided by the City's Exhibit E. Here it is shown that, had an annual sum of equal to 2 per cent of the cost of the companies' properties been set aside consistently it would have exceeded the actual requirements for retirements ($252,025) by the sum of $5,557. Also, that had such annual sum been accumulated at the rate of 5%, there would have been a surplus, over and above actual requirements, of $391,933.

While it is true that rate payers, although having contributed to a depreciation reserve far in excess of the utility's actual requirements, may not have such excess accumulation made applicable to future rates, nevertheless, the depreciation reserve so reflected by the Company's books and records may well be utilized by the Commission as a guide in determining the rate of depreciation sufficient to meet future needs.

The Supreme Court of the United States in the case of Smith v. Illinois Bell Telephone Company, 282 U. S. 133, 75 L. Ed. 255, speaking through Mr. Chief Justice Hughes, says:

> "While it has been held by this court that property paid for out of moneys received for past services belongs to the Company, and that the property represented by the credit balance in the reserve for depreciation cannot be used to support the imposition of a confiscatory rate (Public Utility Comrs. v. New York Teleph. Co., 271 U. S. 23, 70 L. Ed. 808; P. U. R. 1926, C. 740, 46 Sup. Ct. Rep. 363), it is evident that past experience is an indication of the company's requirements for the future. The recognition of the ownership of the property represented by the reserve does not make it necessary to allow similar accumulations to go on if experience shows that these are excessive."

Engineer Elrod, for the City, expressed the opinion that an allowance of 2 per cent per annum represents a sufficient sum for future annual depreciation for the Company.

Engineer Greene, for the Company, testified that the Company should be allowed depreciation at the rate of 5 per cent on the distribution system, 6 per cent on the transmission system, and 10 per cent on the gathering system.

It is obvious that the rates of depreciation on property units installed within the past few years, and on those units to be installed in the future, need not be as large as the rates that were applicable previously due to the fact that more permanent and improved materials and appliances have been, and are being, and will be used, than was the case in the past. For instance, the greater portion of all pipe lines, involved here, laid prior to 1916, was not protected with

covering. Of recent years, no unprotected pipe line has been laid, nor is it probable that any such pipe will ever be laid again. Scientific discoveries and improved materials and better knowledge of methods are continually reducing the cost of depreciation.

In view of the conflicting testimony as to the physical condition of certain portions of the properties, we are of the opinion that a rate of depreciation of 2 per cent may be too low for application in this particular case. On the other hand, we believe that the rates of five, six and ten per cent, respectively, as asked for by the Company are far in excess of its future needs. Therefore, in the light of the record before us, we are fixing the annual depreciation rate at 3 per cent which we consider ample to meet the Company's future requirements.

General Overheads.

The allowances claimed for general overheads by the Company, and by the City respectively, are as follows:

	Company.	City..
Preliminary and Organization	$ 35,505	$ 18,371
Engineering and Superintendence	50,124	17,408
Administration and Legal	33,831	10,445
Taxes during Construction	6,257	4,593
Interest during Construction	48,581	24,371
Total	$ 174,298	$ 75,188

Claims for these items are based on assumptions and calculations of both the Company's and City's engineers. The amount contended for by the Company is approximately 19.96 per cent of its appraised value of the physical properties, while the amount set up by the City is 10 per cent of the City's total, as reflected in its appraisal of the physical properties.

Available Revenue.

The Company presented a "set up" (Ex. 4) of operating revenues and expenses for the 12 months' period ending

July 31, 1932, only, for consideration in the computation of a fair return upon its plant value. On the other hand, the City presented a similar "set up" (Ex. L) covering the years ending June 30, 1929, 1930, and 1931, and for the year ending July 31, 1932—a period of four years; it contended that since the year ending July 31, 1932, was patently a subnormal business year, such single year should not be taken, alone, as the test period for the computation necessary. It is our opinion that the one year ending July 31, 1932, should not be taken as the test period. It is a matter of common knowledge, we believe, that from a general business standpoint, the year 1932 was the worst year since 1929. The City's Exhibit L shows that the fiscal year 1931, in comparison with the years immediately preceding it, was subnormal also; therefore, the year 1931 should not be taken as the test period, nor should an average of these two years be taken.

Just as it would be unfair to the City to take 1932, or 1931, alone, or an average of both, as the test period, it would be unfair to the Company to take the year 1930, or even an average of the 3 years 1930, 1931, and 1932, as the test period, as it is shown that the year 1930 was the best year, in point of gross revenues, that the Company had experienced since 1928.

The year 1929, while it was a better year than 1931 in point of gross revenue by $27,168, was a leaner year than 1930 by $38,153; its inclusion in the test period tends to equalize the effect of the inclusion of the better year 1930.

Therefore, in the light of ample lawful precedent for the taking of an average of four successive years immediately preceding the date of the investigation, as the test period, and because in so doing we believe that justice is done to both parties, we are of the opinion and hold that an average of revenues and expenses for the four fiscal years 1929, 1930, 1931 and 1932 constitutes the test period for the computation of the rate structure upon which a fair return is to be predicated.

The number of consumers of natural gas in the City of Laredo, and the volume of gas consumed is reflected in the Company's sworn reports on file with the Commission for the years 1929, 1930, 1931 and 1932.

The Company contends for an allowance of 1 cent per M. C. F. of gas purchased in the Carolina-Texas Field, as a gathering charge. The gathering lines in this field are not the property of the Company, but are the property of the Southern Gas Company, an affiliate. The basis of the Company's contention for the 1 cent gathering charge is a contract (Ex. 10) between it and its affiliate company, which contract stipulates a charge of 1 cent per M. C. F. for the use of its gathering lines and facilities.

The Company witness Abernathy, its Superintendent of Transportation, testified that the reasonable cost of constructing this gathering line and facilities would be approximately $25,000. On the basis of the volume of gas purchased for Laredo (as per 4-year average = 730,404 M. C. F.) assuming that all gas purchased comes from the Carolina-Texas Field (although, included in the City's Rate Base is a sum of $10,342 for the present value of a gathering system in the West Jennings Field), this gathering charge would amount to $7,304 per annum. As a comparison, a fair return on the cost new of this Carolina-Texas gathering system (based on 7% return 3% depreciation, plus an approximate 10% operating charge) is 20%, or $5,000. Of this total, however, only approximately $4,000 would be allocable to Laredo; obviously, the fair return on the present depreciated value of the existing gathering system would be considerably less. In the light of the evidence herein, we are of the opinion that if the 1 cent gathering charge contract had been made at "arms length", and not by two affiliated companies, a reasonable gathering charge would very probably have been set at ¼ of one cent per M. C. F. rather than at 1 cent. In view of the circumstances in connection with this particular transaction, we are of the opinion that a gathering charge of ½ of 1 cent per M. C. F. of gas purchased from the Carolina-Texas Field is a fair charge allowable in connection with the computation of the rate structure herein.

The Company includes in its operating statement a charge designated "pipe line rental" covering an alleged expense incurred by the Company to an affiliate for the use of a section of gas transmission line situated in the East Jen-

nings Field. The City takes the position that this item is not properly chargeable to the Laredo rate payers as it is not being used to transport gas to Laredo, nor is it necessary to such transportation. The record, in our opinion, does not justify the inclusion of this item as chargeable against the rate payers in the City of Laredo.

The Company also contends for the allowance as proper operating expense of certain amounts claimed for management fees, loss on bad debts, advertising, general office expense (prorated between interconnected companies), special payrolls of the United Gas Company (the parent company), general expense (prorated with Southern Gas Company, an affiliate company), maintenance of general structure, testing mains for leaks, Laredo Rate Case expense, and Donations.

It is the contention of the City, on the other hand, that such allowance in favor of the Company as an operating charge is not properly supported under the facts and circumstances in this case, and the City asks for its elimination in the computation of the fair rate of return.

From the facts reflected by the record before us, we find that the Company has not shown itself entitled to the allowances which it asks the Commission to make in this regard. However, we feel that reasonable compensation should be allowed the Company in connection with loss on bad debts, general office expense, advertising, maintenance of general structures, donations, testing mains for leaks, and the Laredo Rate Case expense (amortized over a period of ten years), and we have made allowance for all such, in arriving at a just and fair rate of return in this case.

In arriving at a decision and making an order herein that is deemed by the Commission to be just and reasonable, we have carefully and fully considered all the evidence presented and all the facts and circumstances reflected by the record herein; and upon giving due consideration to all the elements of value inhering in the property involved in this proceeding, have valued the company's properties as an operating concern, with business attached; have made ample allowance for materials and supplies, working cash, and general overheads; and have included in such

value the Pescadito-Jennings Transmission Line and the West Jennings Gathering System (although the record clearly discloses that these last two named property items are neither being used, nor are they necessary as standby equipment), and we find the present fair value of the properties of the company used, and useful in the gathering, transporting and distributing of natural gas within the City of Laredo, Texas, to be in the sum of $885,000.

The said total present value of the properties thus found by us exceeds substantially the original or historical cost thereof, as shown by the record in this case.

In view of the facts and circumstances hereinabove enumerated and because of the valuation of the properties as herein stated, we find that no additional and separate allowance for going concern value is justified in this case, and no such additional and separate item is allowed.

We find that an annual rate of return equal to seven per cent (7%) of the present fair value of the properties as herein found is adequate.

We find that the following schedule of rates is just and reasonable herein, and that its application will produce a net return in excess of seven per cent (7%) per annum on the present fair value of the properties, after provision for operations and reserve for depreciation.

Rate Schedule.

On natural gas for all domestic uses, 55 cents, net, per M. C. F.

Minimum bill per user per month, $1.00.

Penalty for non-payment within 10 days from the date of rendition of bill, 10% of the amount thereof.

The proper order will be issued putting into effect the above findings.

Order.

In the above numbered and entitled cause, the Commission having heard the evidence presented by all parties at interest pertaining to the matters and things therein involved, and having now carefully and duly considered the same, and having filed in this case its opinion in writing

getting forth its conclusions and findings, which said opinion is hereby made a part of this order, it is

Ordered, Adjudged and Decreed by the Railroad Commission of Texas, that the rates to be charged to the consumers of Natural Gas within the City of Laredo, Texas, from and after the 1st day of January, A. D. 1932, shall be as follows:

For natural gas for domestic use, 55 cents net per M. C. F.
Minimum bill per user per month, $1.00.
Penalty for non-payment of bills within 10 days from date of rendition, 10% of the amount thereof.

It is further Ordered by the Railroad Commission of Texas that no fixed charge be set for the sale of natural gas to non-domestic consumers in the City of Laredo.

It is further Ordered by the Railroad Commission of Texas that the Texas Border Gas Company shall refund to the city of Laredo for the benefit of the domestic gas consumers the difference between the amount collected by the Border Gas Company and the amount that would have been due by domestic consumers under this order.

It is further Ordered, Adjudged and Decreed by the Railroad Commission of Texas that the application of the Texas Border Gas Company filed herein on the 16th day of September, 1932 (Gas Utility Docket No. 63), for an increase in the rates to be charged to domestic consumers of natural gas within the City of Laredo, Texas, be, and the same is hereby denied.

Dated at Austin, Texas this the 13th day of June, A. D., 1933.

RAILROAD COMMISSION OF TEXAS,
By (Signed) LON A. SMITH,
Chairman,
(Signed) C. V. TERRELL,
(Signed) ERNEST O. THOMPSON,
Commissioners.

Attest:
C. F. PETET,
Secretary.
(SEAL.)

(8844-C)

FILE COPY

Office - Supreme Court, U. S
FILED
MAY 3 1937
CHARLES ELMORE CROPLEY
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. [redacted] 13

UNITED GAS PUBLIC SERVICE COMPANY,
Appellant,

v.

STATE OF TEXAS ET AL., *Appellees.*

APPEAL FROM THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF TEXAS.

APPELLANT'S BRIEF OPPOSING APPELLEES' MOTION TO DISMISS

JOHN P. BULLINGTON,
F. G. COATES,
Counsel for Appellant,
United Gas Public Service Company.

INDEX

	PAGES
Matters Not In Dispute	2
Summary Statement of the Authority Upon Which the Appeal Was Taken	3-5
One Question Asserted by Appellees' Motion	5
Appellees Present No Tenable Ground for Dismissal	6-9
Face of the Record	10-12
The Record Shows Affirmatively and Conclusively That An Appeal from the Supreme Court of Texas Cannot Be Supported	13
The Question of State Law Asserted by Appellees Is Either Wholly Devoid of Merit, or Too Doubtful to Support Their Motion	13-26
Conclusion	26

DECISIONS

	PAGES
American Ry. Exp. Co. v. Levee, 263 U. S. 19, 21	23
Atherton v. Fowler, 91 U. S. 143, 146, 147	23
Bacon v. Texas, 163 U. S. 207, 215, 216	3, 7
Bain Peanut Co. v. Pinson, 282 U. S. 499	3
Barwise v. Sheppard, 299 U. S. 33	3
Bomar v. West, 87 Tex. 299, 302	20
City of Houston v. City of Palestine, 114 Tex. 306, 313-314	25
City Nat. Bk. v. El Paso & Northeastern R. R. Co. et al., 258 U. S. 616	4
City of Palestine v. City of Houston, 262 S. W. 215, 220	25
Consolidated Turnpike Co. v. Norfolk &c Ry. Co., 228 U. S. 326, 334-335	22
Danciger & Emerich Oil Co. v. Smith, 274 U. S. 733	4
Gammel Statesman Pub. Co. v. Ben C. Jones & Co., 206 S. W. 931	13, 23
G. H. & S. A. Ry. Co. v. Texas, 246 U. S. 548	22
Gatz v. City of Kerrville, 121 Tex. 92, 93	4, 14, 16, 21
Harris Co. v. Charlton, 112 Tex. 19, 26	20
Henkel v. Cincinnati, 177 U. S. 170, 171	22
Hodges v. Snyder, 261 U. S. 600, 601	23
Holland v. Nimitz, 111 Tex. 419, 432	20
Internat'l. & G. N. Ry. Co. v. Anderson Co., 246 U. S. 424	3, 25
I. & G. N. Ry. Co. v. Anderson Co., 174 S. W. 305	25
Joe Edgar, plaintiff in error, v. Stanolind Oil Company, et al, defendants in error, Application No. 22,410, 90 S. W. (2d), 656; 98 S. W. (2d) 222	25, 26
Louisiana Nav. Co. v. Oyster Commission, 226 U. S. 99, 101	4, 6, 7
Missouri Kans. & Tex. Ry. Co. v. Texas, 245 U. S. 484	3, 22
M-K-T R. R. Co. of Texas v. State, 271 U. S. 653	4

PAGES

M-K-T R. R. Co. v. King, 273 U. S. 680 4
M. K. & T. Ry. Co. of Texas v. State, 107 Tex. 540, 544 23
National Cotton Oil Co. v. Texas, 197 U. S. 115, 118 ..... 3, 7
Norfolk Turnpike Co. v. Virginia, 225 U. S. 264, 269 ..... 4, 6, 7, 13
Royster Guano Co. v. Virginia, 253 U. S. 412, 413 ..... 4, 7
Radice v. New York, 264 U. S. 292, 293 23
San Antonio & A. P. Ry. v. Blair, 108 Tex. 434, 437-441, 440-441 ..... 4, 15, 16, 21
San Antonio Ry. v. Wagner, 241 U. S. 476 3
St. L. & San Francisco Ry. v. Seale, 229 U. S. 156, 157 ..... 3, 4, 7
Stanley v. Schwalby, 162 U. S. 255, 269 ..... 3, 7
So. Pac. Co. v. Berkshire, etc., 250 U. S. 638 3
Sullivan v. Texas, 207 U. S. 416, 422 ..... 3, 7
Texas Co. v. Clark & Co., 112 Tex. 74, 78-79 18
Texas & Pac. R. Co. v. Guidry, 280 U. S. 538 4
T. & N. O. R. R. Co. v. Sabine Tram Co., 227 U. S. 111 3
Virginian Railway Co. v. Mullens, 271 U. S. 220, 222 23
Waters-Pierce Oil Co. v. Texas, 177 U. S. 28, 41 ..... 3, 7
Waters-Pierce Oil Co. v. Texas (No. 1), 212 U. S. 86, 97 ..... 3, 7
Western Union v. Crovo, 220 U. S. 364, 366 23
Western Union v. Priester, 276 U. S. 252, 258 ..... 4, 8
Western Union Teleg. Co. v. Southwick, 251 U. S. 549 3
Yazoo and Mississippi R'd Co. v. Adams, 180 U. S. 41, 48 22
Zucht v. King, 260 U. S. 174 3

Statutes

	PAGES
Acts 1930, 41st Leg., 5th Called Session, Chap. 2, p. 112	14
Art. V, sec. 2, Constitution of Texas	4, 14, 15
Article 1641, Revised Civil Stats. of Texas, 1911	24
Articles 1739, 1750, 1766-1767, 1771, 1773, 1777, 1780, 1800a, sec. 5, 1864, 1867, 1881, 1883, Revised Civil Statutes of Texas, 1925	4, 5
Article 1728, Revised Civil Statutes of Texas, 1925	17, 20
Article 1739, Revised Civil Statutes of Texas, 1925	17
Article 1750, Revised Civil Statutes of Texas, 1925	16
Article 1766, Revised Civil Statutes of Texas, 1925	18, 21
Article 1767, Revised Civil Statutes of Texas, 1925	18, 21
Article 1771, Revised Civil Statutes of Texas, 1925	18
Article 1773, Revised Civil Statutes of Texas, 1925	19, 21
Article 1777, Revised Civil Statutes of Texas, 1925	19, 21
Article 1780, Revised Civil Statutes of Texas, 1925	19, 21
Article 1800a, sec. 5, Revised Civil Statutes of Texas, 1925	14
Title 28, sec. 344, U. S. C.	8

Court Rules

Rules 2, 8 and 13 (Tex. Sup.), 121 Tex. 747, 750	17
Rules 2-8, 13, 19, Supreme Court of Texas, 121 Texas 747-752	5
Rules 2, 8 (Tex. Sup.), 121 Tex. 747, 750	17
Rule 4 (Tex. Sup.), 121 Tex. 748	18
Rule 5 (Tex. Sup.), 121 Tex. 748, 749	19
Rule 7, paragraph 3 (U. S. Sup.)	1
Rules 5 and 8 (Tex. Sup.), 121 Tex. 748, 750	19
Rule 8 (Tex. Sup.), 121 Tex. 750	19, 21
Rule 12, paragraph 2 (U. S. Sup.)	2
Rule 19 (Tex. Sup.), 121 Tex. 751-752	19, 21

Texts

Hughes Federal Practice, secs. 3189, 3214 and 3216	8
Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States, section 48, p. 83-85	4, 8